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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

BLOCK 173 ASSOCIATES,

Petitioner,

v.

THE CITY AND COUNTY OF DENVER, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

In a case in which a landowner alleges, with substantial support in the record, that municipal and private defendants have constructed a paper record of compliance with the state urban renewal law in order to disguise their involvement in an unauthorized conspiracy to monopolize the relevant market and deprive the landowner of property rights:

1. Does the state-action doctrine provide the municipal defendants with immunity from the federal antitrust laws?

2. Is the private defendant entitled to antitrust immunity under the *Noerr-Pennington* doctrine?

3. In the civil rights claim, should the actions of the municipal and private defendants be measured by the rational basis standard framed to test actions taken by a sovereign state?

LIST OF PARTIES

Petitioner before this Court is Block 173 Associates, a Colorado general partnership. Petitioner was plaintiff-appellant in the action below.

Respondents before this Court are: Donald Oberndorf; Leo Stern; Harry Paul Westheimer; Carol Brodie, Trust Administrator for Edith O. Westheimer Trust; and Dottie Hammel ("Oberndorf group"), plaintiffs-appellants with petitioner in the action below;

City and County of Denver; the City Council of the City and County of Denver, by its members (not as individuals), T.J. Hackworth, J.L. Sandos, Stephanie A. Foote, Paul L. Swalm, John J. Silchia, Nieves Peres McIntire, Hiawatha Davis, Jr., Salvadore Carpio, Cathy Donohue, William R. Roberts, Robert L. Crider, Cathy Reynolds, William A. Scheitler; the Denver Urban Renewal Authority ("DURA"); Federico Peña, as Mayor of the City and County of Denver ("municipal defendants"), defendants-appellees in the action below; and

BCE Development Properties, Inc. ("BCED"), a Colorado corporation, f/k/a Oxford Properties, Inc., defendant-appellee in the actions below.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES ii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

I. PRELIMINARY STATEMENT 3

II. STATEMENT OF FACTS 5

A. The Facts Leading Up to Formation of the Conspiracy 5

B. The Genesis of the Conspiracy 6

C. Affirmative Action In Furtherance of the Conspiracy 8

1. The Centerstone Committee 8

2. The Sham Blight Study 9

3. The Predetermined Urban Renewal Plan .. 9

D. The Lawsuit 10

1. Complaint and Motion to Dismiss 10

2. Facts Supporting Petitioner's Position Disclosed in Discovery Phase of Litigation 12

3. Summary Judgment Entered in Favor of Defendants 13

TABLE OF CONTENTS – Continued

Page

REASONS FOR GRANTING THE WRIT 13

I. THE TENTH CIRCUIT'S DECISION TO BESTOW ANTITRUST IMMUNITIES ON THE MUNICIPAL AND PRIVATE DEFENDANTS EXTENDS THESE IMMUNITIES BEYOND THE LIMITS OF THIS COURT'S ESTABLISHED DOCTRINES AND CONFLICTS WITH DECISIONS OF OTHER CIRCUITS..... 13

A. The Municipal Defendants Are Not Entitled to State-Action Immunity. Their Actions Were Not Authorized by State Law, and the Paper Record Generated by the Municipality to Create a Facade of Compliance with State Law did not Alter this Fact 15

B. The Depth of BCED's Involvement in the Unauthorized Anticompetitive Conduct Precludes the Protection of *Noerr-Pennington* Immunity 20

II. THE TENTH CIRCUIT PERMITTED THE DEFENDANTS TO ESCAPE CIVIL RIGHTS LIABILITY FOR THE UNAUTHORIZED CONDEMNATION OF PLAINTIFFS' LAND 23

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES

Affiliated Capital Corp. v. City of Houston, 735 F.2d 1555 (5th Cir. 1984), *cert. denied sub nom. Gulf Coast Cable Television Co. v. Affiliated Capital Corp.*, 474 U.S. 1053 (1986) 22

Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988) 21

Berman v. Parker, 348 U.S. 26 (1954) 24

Boone v. Redevelopment Agency of City of San Jose, 841 F.2d 886 (9th Cir. 1988), *cert. denied*, 109 S.Ct. 489 (1988) 19, 20, 23

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972) 21

California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) 19

California v. Federal Power Commission, 369 U.S. 482 (1962) 20

Campbell v. City of Chicago, 577 F. Supp. 1166 (N.D. Ill. 1983) 22

Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) 20

Central Telecommunications, Inc. v. City of Jefferson City, 589 F. Supp. 85 (W.D. Mo. 1984) 22

City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978) 14, 15, 16, 20, 24

Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982) 16

TABLE OF AUTHORITIES – Continued

Page

Duke & Co. v. Foerster, 521 F.2d 1277 (3rd Cir. 1975) 22

Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) 14

Harman v. Valley National Bank of Arizona, 339 F.2d 564 (9th Cir. 1964) 23

Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984) 24

Metro Cable Co. v. CATV of Rockford, Inc., 516 F.2d 220 (7th Cir. 1975) 22

Oberndorf v. City and County of Denver, 900 F.2d 1434 (10th Cir. 1990) 1, 2

Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc., 891 F.2d 1127 (4th Cir. 1989), *cert. granted*, 58 U.S.L.W. 3800 (1990) 4, 17, 19, 22

Parker v. Brown, 317 U.S. 341 (1943) 14, 24

Patrick v. Burget, 486 U.S. 94 (1988) 18, 19

Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 304 N.W. 2d 455 (1981) 4

Rabinoff v. District Court of Denver, 145 Colo. 225, 360 P.2d 114 (1961) 16

Richard Hoffman Corp. v. Integrated Building Systems, Inc., 581 F. Supp. 367 (N.D. Ill. 1984) 22

Schiessle v. Stephens, 525 F. Supp. 763 (N.D. Ill. 1981) 4

Scott v. City of Sioux City, 736 F.2d 1207 (8th Cir. 1984), *cert. denied*, 471 U.S. 1003 (1985) 19, 20

Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985) 14, 15, 16, 19

TABLE OF AUTHORITIES – Continued

Page

United Mine Workers v. Pennington, 381 U.S. 657 (1965) 14

Westborough Mall, Inc. v. City of Cape Girardeau, 693 F.2d 733 (8th Cir. 1982), *cert. denied sub nom. Drury v. Westborough Mall, Inc.*, 461 U.S. 945 (1983) 4, 17, 19

Whitworth v. Perkins, 559 F.2d 378 (5th Cir. 1977), *vacated sub nom. City of Impact v. Whitworth*, 435 U.S. 992 (1978), *reinstated*, 576 F.2d 696 (5th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979) 18, 19

STATUTES AND RULES

FEDERAL

15 U.S.C.A. § 1 (1985) 3, 11, 13

15 U.S.C.A. § 2 (1985) 3, 11, 13

15 U.S.C.A. § 26 (1973) 11

28 U.S.C.A. § 1254(1) (1988) 2

28 U.S.C.A. § 1331 (1986) 11

28 U.S.C.A. § 1343 (1986) 11

42 U.S.C.A. § 1983 (1981) 3, 11

Fed. R. Civ. P. 56 3

STATE

Colo. Rev. Stat. §§ 31-25-101 to -115 (1986) 3, 7

Colo. Rev. Stat. § 31-25-102 (1986) 7, 16

Colo. Rev. Stat. § 31-25-104(10) (1986) 16

Colo. Rev. Stat. § 31-25-106(2) (1986) 11

Colo. Rev. Stat. § 31-25-107(1) (1986) 7, 17

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BLOCK 173 ASSOCIATES,

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THE CITY AND COUNTY OF DENVER, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner Block 173 Associates respectfully prays that a Writ of Certiorari issue to review the judgment and order of the United States Court of Appeals for the Tenth Circuit entered in this antitrust and civil rights action arising from unauthorized land-use restrictions.

OPINIONS BELOW

Review is sought of the Tenth Circuit opinion, reported as *Oberndorf v. City and County of Denver*, 900 F.2d 1434 (10th Cir. 1990), which affirmed the district

court's entry of summary judgment in favor of the defendants. It is reprinted in Appendix A at 1a. The Order and Opinion of the United States District Court for the District of Colorado (Carrigan, J.), reported as 696 F. Supp. 552 (D. Colo. 1988), is reprinted in Appendix C at 21a.

The Order and Opinion of the United States District Court for the District of Colorado (Kane, J.) denying the defendants' motion to dismiss and defendants' motions for reconsideration, reported as *Oberndorf v. City and County of Denver*, 653 F. Supp. 304 (D. Colo. 1986), is reprinted in Appendix D at 42a.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit, was entered on March 29, 1990. Appendix B at 20a. No petition for rehearing was filed. This Petition for Certiorari is filed within ninety days of the date of judgment.

This Court's jurisdiction arises under 28 U.S.C.A. § 1254(1) (1988).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section One of the Fourteenth Amendment, United States Constitution, provides: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

The federal statutes involved, 15 U.S.C.A. §§ 1, 2 (1985) and 42 U.S.C.A. § 1983 (1981), are reprinted in Appendix E at 70a.

The applicable sections of the Colorado Urban Renewal Act, Colo. Rev. Stat. §§ 31-25-101 to -115 (1986), are reprinted in Appendix F at 73a.

STATEMENT OF THE CASE

I. PRELIMINARY STATEMENT

In this land-use case, the municipal and private defendants: (a) acted in concert to implement an anticompetitive urban renewal plan in complete disregard of state statutes; (b) received a license to do so from the federal courts in Colorado; (c) eliminated the competitive market for developable property in downtown Denver; and (d) interfered with the plaintiffs' property rights. The Tenth Circuit's disposition of the plaintiffs' claims cloaks municipalities with total immunity for anticompetitive conduct even though that conduct is not authorized by state law. It also expands *Noerr-Pennington* immunity beyond its reasonable limits and misconstrues the elements of liability under the Civil Rights Act.

As to state-action immunity, both the district court and the circuit court granted the defendants immunity from the constraints of the federal antitrust and civil rights laws because they had successfully concocted a paper record of superficial compliance with Colorado urban renewal statutes. Had either court undertaken a full review of the evidentiary record, as required by Rule 56 of the Federal Rules of Civil Procedure and this

Court's opinions, it would have become evident that: (a) the defendants' actions were not authorized or even contemplated by the state legislature and (b) the defendants' conduct was simply designed to create a facade of compliance with state urban renewal law. If the decisions of the lower tribunals are permitted to stand, municipalities would have blanket antitrust immunity in land-use cases, as long as they make a token effort to compile a record showing facial justification for their activities.

This case also raises substantial questions about the scope of the *Noerr-Pennington* immunity doctrine in instances where: (a) a private defendant conspires with a municipality to reach a result both parties know to be illegal under their state laws and (b) the municipality allows its activities to become so intertwined with those of the private defendant that the two entities act as one.

These antitrust issues will arise as frequently as municipalities succumb to demands by private enterprises for public land-use decisions which eliminate this competition.[1] The facts of this case present an ideal

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[1] *See, e.g., Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc.*, 891 F.2d 1127 (4th Cir. 1989) (Illegal influence on city officials permitted billboard company to keep rival out of outdoor advertising market); *Westborough Mall, Inc. v. City of Cape Girardeau*, 693 F.2d 733 (8th Cir. 1982), *cert. denied sub nom. Drury v. Westborough Mall, Inc.*, 461 U.S. 945 (1983) (Developer of shopping mall secured city agreement to prevent construction of a competing mall); *Schiessle v. Stephens*, 525 F. Supp. 763 (N.D. Ill. 1981) (Private developers arranged for a redevelopment plan under which property was to be taken by eminent domain for their use and benefit); *Poletown*

(Continued on following page)

opportunity for this Court to (a) clarify the law regarding the scope of municipal immunity from federal antitrust liability and (b) bring a halt to the indiscriminate expansion of the state-action and *Noerr-Pennington* exceptions to federal antitrust law.

Furthermore, a reasoned resolution of the civil rights aspect of the case requires a determination of the proper standard for judging the actions of municipalities, in contrast to the actions of a sovereign state. The lower court held that the sole standard for judging municipal conduct under the civil rights law is whether that conduct furthers a public purpose. Appendix A at 15a; Appendix C at 38a. We submit that where the questioned conduct is that of a municipality, as opposed to a state institution, the inquiry under the Civil Rights Act cannot end with a mere determination of public purpose. Rather, when municipal conduct results in the taking of private property, a further inquiry is required as to whether the municipality's actions were within the scope of its delegated power.

II. STATEMENT OF FACTS

A. The Facts Leading Up to Formation of the Conspiracy.

In 1983, defendant BCED, a corporation engaged in commercial real estate development, decided to construct

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(Continued from previous page)

Neighborhood Council v. City of Detroit, 410 Mich. 616, 304 N.W. 2d 455 (1981) (General Motors Corp. threatened to relocate unless the city condemned a 465-acre tract of land and reconveyed on favorable terms).

a commercial-retail complex, to be called Centerstone, on either two or three blocks of Denver's main shopping street, the Sixteenth Street Mall. Appendix C at 24a-25a. BCED owned or controlled part of one of the proposed Centerstone blocks. Petitioner Block 173 Associates owned all of the second block in fee simple. *Id.* at 22a-23a. The remainder of the first block was owned by the Oberndorfs, who were plaintiffs and appellants along with Block 173 Associates in the lower courts. *Id.* at 23a.[2]

In analyzing the proposed project, BCED recognized two fatal impediments to the project's viability: (a) the cost of the project rendered it uneconomical and (b) BCED could not acquire full ownership of the necessary property because the petitioner and the Oberndorf group were not willing to sell for the price BCED wanted to pay. Record.[3] In order to overcome these impediments, BCED enlisted the aid of the City. Appendix C at 24a; Record.[4]

B. The Genesis of the Conspiracy.

In December, 1984, BCED and the City held a press conference to announce their intention to construct Centerstone. Appendix C at 25a. After successfully recruiting the City, BCED proceeded to study the problems of financing and property acquisition in more detail. It

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[2] A department store was located on the third block. There was a possibility that it would be incorporated into the project. Appendix C at 25a.

[3] Exhibits 42 at 11; 75 at 2.

[4] Exhibit 537 at 3; Depositions of Peña at 20-22, 61; Gougeon at 16-17; Fleming at 63-64; Heise at 149.

concluded that the only possible funding option was the use of tax increment financing, which allows the sale of municipal bonds to raise funds for improvements. Appendix A at 12a. The financing alone could not insure the construction of Centerstone, however. BCED also needed to acquire the property owned by Block 173 Associates and the Oberndorf group, which threatened to be a costly proposition. Record.[5] This latter problem could only be overcome through forcibly taking the necessary land through use of the City's condemnation power. Record.[6]

The Colorado Urban Renewal Act, Colo. Rev. Stat. §§ 31-25-101 to -115 (1986), Appendix F at 73a, is the only Colorado statute that contains a delegation of authority for municipalities to utilize both tax increment financing and condemnation power. Appendix A at 4a. However, both BCED and the City immediately recognized that the urban renewal law was not intended to effectuate the objectives of the Centerstone project. Rather, its sole purpose is to eradicate urban blight. Colo. Rev. Stat. § 31-25-102; Appendix F at 73a. No urban renewal project may be undertaken unless the appropriate governmental authority determines that the project area is a slum or blighted area. Colo. Rev. Stat. § 31-25-107(1); Appendix F at 86a. *See also* Appendix A at 4a. The reality was that no blight existed on any of the three blocks designated for the proposed project. Appendix C at 26a.

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[5] Exhibit 42 at 11; 75 at 2.

[6] Deposition of Macy at 30.

C. Affirmative Action In Furtherance of the Conspiracy.

1. The Centerstone Committee.

The City and BCED set up the "Centerstone Committee" to deal with the legal obstacles blocking BCED's goal of a Centerstone complex subsidized by tax increment financing. The group, which included city officials, BCED representatives, BCED attorneys and experts, and officials of defendant DURA, met in a series of closed meetings. No other developer was invited to attend these meetings. With its focus on bringing BCED's plans to fruition, the group discussed the urban renewal plan, the selection of the urban renewal/tax increment district, a blight study, condemnation and other related issues. Record.[7]

As a result of these discussions, BCED's attorneys drafted a resolution for enactment by the city council. *Id.*[8] The draft contained a scheme to evade the legal restraints of the Colorado Urban Renewal Act. In essence, the strategy was to circumvent the inescapable lack of blight on the Centerstone property by expanding the urban renewal area to a sufficient size to include some blight; namely, fifteen blocks.[9] Appendix C at 26a.

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[7] Exhibit A (Minutes of Centerstone Committee).

[8] Exhibit 6.

[9] This case thus presents a far different situation from that discussed in the lower courts' opinions, in which an urban renewal area, validly drawn to eliminate blight, contains unblighted as well as blighted sections. Appendix A at 9a; Appendix C at 35a. In the case at bar, no blight existed in the targeted blocks. The defendants searched an ever-expanding area to find the necessary blight.

2. The Sham Blight Study.

The City approved the draft resolution in December, 1985. *Id.* This set the stage for a blight survey of a fifteen-block area, even though Centerstone, BCED's project, was to be built on only two or three blocks on the periphery of the study area. *Id.* Not surprisingly, blight was found within the broad area, although none was found in the target area. *Id.* At their depositions, city officials described the process as a "joke," a "sham," a "farce" and "ludicrous." Record.[10]

3. The Predetermined Urban Renewal Plan.

While the foreordained results of the blight study were being compiled, DURA, under the direction of the Centerstone Committee, supposedly developed an urban renewal plan. *See* Appendix C at 26a. In fact, the final drafts of the plan were authored by BCED's attorneys. Record.[11] The draftsmen were aware of the fact that the entire purpose of the urban renewal plan was to construct a three-block project on nonblighted property, but that a fifteen-block area was necessary to give the appearance of meeting the statutory requirement of blight within the urban renewal area.

In order to deal with this incongruous situation, the drafters of the plan established two separate and distinct

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[10] Depositions of Silchia at 32-35, 42, 50; Macy at 29, 59-60; Swalm at 35, 42.

[11] Depositions of Cheroutes at 50-51; McFadyen at 402-403; Fleissig at 173-76.

"phases." Phase I was synonymous with Centerstone, and the plan spelled out in detail precisely what activities would take place in Phase I. On the other hand, the remaining twelve or thirteen blocks, which were only included to facilitate a blight finding, were placed in Phase II. The plan did not identify any urban renewal or rehabilitation activity for the Phase II area. Condemnation power was authorized only for Phase I.[12] Appendix C at 27a.

In accordance with the scheme, the city council adopted the plan as proposed, in spite of the lack of authorization for its actions. BCED was selected to build Phase I (Centerstone), *id.* at 28a, which it had proposed four years earlier, before compliance with the Colorado Urban Renewal Act was ever contemplated or necessary.

D. The Lawsuit.

1. Complaint and Motion to Dismiss.

Block 173 Associates and the Oberndorf group filed lawsuits, consolidated in the United States District Court for the District of Colorado, contending that the municipal defendants and BCED had illegally conspired to evade provisions of the Colorado Urban Renewal Act in order to condemn the property coveted by BCED. Appendix D at 60a. Petitioners further contended that the urban renewal plan eliminated competition among buyers and

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[12] The framers of the plan recognized that since no activity was planned for Phase II property there was no need to authorize condemnation power. To do so would simply create unnecessary controversy with landowners in the Phase II area.

developers in the relevant market, amounting to a restraint of trade in violation of sections one and two of the Sherman Antitrust Act.[13] Appendix E at 70a-71a. *See also* Appendix D at 60a. Finally, petitioners claimed that the urban renewal plan constituted a taking of property without due process, since eminent domain proceedings had been instituted without proper delegation of state authority. 42 U.S.C.A. § 1983; Appendix E at 72a. *See also* Appendix A at 5a. The district court had subject matter jurisdiction pursuant to 28 U.S.C.A. §§ 1331, 1343 (1986) and 15 U.S.C.A. § 1 (1985); 15 U.S.C.A. § 26 (1973). Appendix C at 24a.

The defendants filed motions to dismiss based on several grounds, including assertions of antitrust immunity under the *Parker* and *Noerr-Pennington* doctrines. District Court Judge Kane denied the motions to dismiss,

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[13] The anticompetitive effects of the scheme are apparent in even a superficial review of BCED's actions in light of the Colorado Urban Renewal Act. The development market in downtown Denver, or any urban area, consists of four components: (a) the real estate itself; (b) sellers; (c) buyers; and (d) developers. All, in various combinations, compete for economic advantages.

Once an urban renewal plan goes into effect, the market is changed. The city selects a project and determines its location. The only remaining competition centers around the opportunity to develop the selected project on the chosen land. The Colorado Urban Renewal Act explicitly retains this aspect of competition, through the competitive bidding process set out in Colo. Rev. Stat. § 31-25-106(2). The conspiracy eliminated this remaining level of competition since BCED was chosen as developer long before the competitive bidding process was to occur.

Appendix D at 42a-59a, and the motions for reconsideration, *id.* at 60a-69a.

2. Facts Supporting Petitioner's Position Disclosed in Discovery Phase of Litigation.

During discovery, the plaintiffs unearthed extensive information about the intentions and workings of BCED in the Centerstone Committee. The discovery revealed that: (a) Centerstone was the sole project ever envisioned for the entire urban renewal area, Record;[14] (b) the committee was counseled that a smaller district, closely tailored to the Centerstone area, might be declared illegal, *id.*;[15] and (c) the conspirators suffered from no illusions that a meaningful competitive bidding process would be undertaken, since they were in agreement that BCED would develop the project, *id.*[16]

The complete identity of purpose between BCED and the municipality can be found in the mayor's appearance in BCED's promotional movie for Centerstone, *id.*,[17] and his letters to Senator Armstrong and the head of Nordstrom's department stores, in which he identified BCED

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[14] Depositions of Culhane at 87; Silchia at 32; Reynolds at 19, 23; Peña at 32; Donohue at 39, 40, 55.

[15] Depositions of Cheroutes at 134; Fleissig at 87, 167-70.

[16] Silchia, at 51, 80; Reynolds at 22, 58; Foote at 34; Crider at 82; Donohue at 8; Hackworth at 63, 75; McFadyen at 127; Heise at 92, 96; Swalm at 15, 17, 70; Fleissig at 237-40; Gougeon at 47.

[17] Depositions of Garcia at 287-88; Reinertson at 237.

as the developer of Centerstone, *id.*[18] In effect, the Centerstone Committee operated to make the City an instrumentality of BCED's commercial development plans. The parties worked together to achieve BCED's desired result, knowing that the outcome could not comply with Colorado law.

3. Summary Judgment Entered in Favor of Defendants.

Following discovery, the defendants filed motions for summary judgment. District Court Judge Carrigan granted the motions for summary judgment despite the extensive evidence showing that: (a) the urban renewal plan eliminated competition and (b) the defendants' actions were not intended to further an affirmatively expressed state policy to displace competition. Appendix C at 21a-41a. Petitioners appealed the district court order to the Court of Appeals for the Tenth Circuit. The Tenth Circuit affirmed the order. This petition followed.

REASONS FOR GRANTING THE WRIT

I. THE TENTH CIRCUIT'S DECISION TO BESTOW ANTITRUST IMMUNITIES ON THE MUNICIPAL AND PRIVATE DEFENDANTS EXTENDS THESE IMMUNITIES BEYOND THE LIMITS OF THIS COURT'S ESTABLISHED DOCTRINES AND CONFLICTS WITH DECISIONS OF OTHER CIRCUITS.

Through the Sherman Act, 15 U.S.C.A. §§ 1-2, Congress established "a regime of competition as the

[18] Exhibits 537 and 171.

fundamental principal governing commerce in this country." *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 398-99 (1978) (opinion of Brennan, J.). This Court has acknowledged and identified only two public policy doctrines weighty enough to override the federal antitrust laws. *Id.* at 399. In *Parker v. Brown*, 317 U.S. 341 (1943), the Court established the state-action doctrine, which is implicit in the structure of federalism. The doctrine provides that the federal antitrust laws do not prohibit a sovereign state from imposing anticompetitive restraints.

The case law firmly establishes that municipalities themselves have no antitrust immunity. However, recognizing that state policy is sometimes implemented through a delegation of authority to municipalities, this Court created a narrow exception to the general rule. The exception allows municipalities to enjoy the immunity granted to states only when it is evident that their anticompetitive conduct is intended to further the state's policy and is, in fact, authorized by a state delegation of power. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 47 (1985). Unless their activities meet these requirements, municipalities are subject to the requirements of the antitrust laws.

A second implicit exclusion is based on national democratic traditions and fundamental First Amendment principles. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657, 669-72 (1965). Under this exemption, generally referred to as the *Noerr-Pennington* doctrine, persons' legitimate efforts to influence lawmakers to enact legislation are not within the scope of the federal antitrust laws.

Although the activities of the municipal and private defendants in this case do not fall within either of these exceptions, the Tenth Circuit ruled that the defendants were, nevertheless, immune from antitrust liability. In the process, the Tenth Circuit did precisely what a plurality of this Court has warned against – it freed cities, and their private cohorts, to make economic choices counseled solely by their own parochial interests and without regard to anticompetitive effects. *Lafayette*, 435 U.S. at 408.

A. The Municipal Defendants Are Not Entitled to State-Action Immunity. Their Actions Were Not Authorized By State Law, and the Paper Record Generated by the Municipality to Create a Facade of Compliance with State Law did not Alter this Fact.

In essence, the Tenth Circuit decision allows municipalities to manufacture their own immunity from the federal antitrust laws. The result could not be more contrary to this Court's pronouncements that municipalities are not beyond the reach of the antitrust laws by virtue of their status, because they are not themselves sovereign. *Hallie*, 471 U.S. at 38; *Lafayette*, 435 U.S. at 412.

The test for municipal immunity devised by this Court entitles a municipality to immunity only if it demonstrates: (a) the state has adopted a clearly articulated and affirmatively expressed policy to displace competition and (b) the municipality is acting within the authority delegated by the state to carry out that policy. *Hallie*, 471 U.S. at 47. The determination that a municipality's activities meet this test is not a "purely formalistic

inquiry." *Id.* at 39. Even a lawful monopolist may be subject to antitrust restraints when it seeks to extend or exploit its monopoly in a manner not contemplated by its authorization. *Lafayette*, 435 U.S. at 417. Consequently, federal courts may grant federal antitrust immunity to a municipality, but only after a careful review of the challenged activity and the relevant state law.

This Court's decisions with respect to municipal immunity relate primarily to the first element of the test: namely, whether the statute in question articulates a policy to displace competition. *See, e.g., Hallie*, 471 U.S. at 39-46; *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 49-57 (1982); *Lafayette*, 435 U.S. at 415-16. These cases indicate that federal courts must engage in a detailed analysis of the relevant statute in order to determine whether the first element exists. On the other hand, this Court has never explicated the standard to be applied to the second element of the test: namely, that the challenged municipal activity falls within the delegated authority. It is this latter standard which is at issue in the case at bar.[19]

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[19] The existence of the first element is undisputed here. It is plain that the Colorado Urban Renewal Act demonstrates an intention to displace competition in urban renewal areas. Appendix A at 8a. *See also* Footnote 13.

It is equally clear that the municipal defendants did not make an adequate showing on the second element in their summary judgment filings. The object of the law is the elimination of slum and blighted areas. *See Rabinoff v. District Court of Denver*, 145 Colo. 225, 232, 360 P.2d 114, 118 (1961); Colo. Rev. Stat. § 31-25-102, -104(10). In fact, no project may commence

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Given the lack of guidance from this Court as to the level of analysis required for the second element of the municipal immunity test, the circuit courts have adopted varying and inconsistent approaches. As discussed above, this Court requires a thorough review to determine the existence of the first element. Some courts apply that same level of review in analyzing the second element. Others have applied a much more relaxed standard to the determination of the second element.

An illustration of careful review can be found in *Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc.*, 891 F.2d 1127, 1131-34 (4th Cir. 1989), *cert. granted*, 58 U.S.L.W. 3800 (1990). In that case, the Fourth Circuit concluded that, even though the municipality had the authority to regulate the billboard industry, it had not acted pursuant to the purposes of the applicable statute. Instead, the municipality had conspired to further the anticompetitive commercial purposes of a private party. The court therefore withheld *Parker* immunity. *Id.* at 1133.

Thoughtful analysis of state law and its relationship to challenged municipal activities can also be found in *Westborough Mall, Inc. v. City of Cape Girardeau*, 693 F.2d 733 (8th Cir. 1982), *cert. denied sub nom. Drury v. Westborough Mall, Inc.*, 461 U.S. 945 (1983) (*Parker* immunity

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unless the appropriate authority determines by resolution that the project area is blighted or a slum. Colo. Rev. Stat. § 31-25-107(1). There was no blight in the targeted areas. The urban renewal statute did not authorize the project and defendants made no attempt to justify their actions under any other state provisions. Summary judgment should not have been entered in favor of defendants.

unavailable to municipalities that acted solely to further the anticompetitive commercial purposes of private parties) and *Whitworth v. Perkins*, 559 F.2d 378 (5th Cir. 1977), *vacated sub nom. City of Impact v. Whitworth*, 435 U.S. 992 (1978), *reinstated*, 576 F.2d 696 (5th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Authorization for zoning does not insulate defendants from antitrust liability where the plaintiff asserts that the enactment of the zoning ordinance at issue was itself a part of the alleged conspiracy to restrain trade).

The Tenth Circuit's resolution of this case provides a clear example of the lesser level of review. The court deferred to the municipal defendants' declarations that they had demonstrated state authorization. Appendix A at 10a-11a. After determining that the paper record facially complied with the procedures set out in the urban renewal statutes, the court terminated its inquiry and held that state action immunity existed.[20] No consideration was given to the allegations, and, indeed, the

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[20] The district court opinion granted state-action immunity to BCED, as well as the municipal defendants. Appendix C at 37a. The Tenth Circuit opinion states simply "because we affirm the district court's finding that the Municipal defendants were authorized by and acted in accordance with this affirmatively expressed state policy, we affirm the district court's conclusion that state-action immunity applies." The opinion does not explain to whom the immunity applies.

This Court has clearly set out the qualifications for exemption of private parties from the antitrust laws in *Patrick v. Burget*, 486 U.S. 94 (1988). To be eligible for state-action immunity, the anticompetitive conduct engaged in by private parties must be clearly articulated and affirmatively expressed as state policy and *actively supervised* by the *state itself*. The active

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substantial evidence, that the paper record was established by the defendants solely for the purpose of masking conduct which was not authorized by the Colorado urban renewal statutes.[21]

We submit there are several strong reasons why the approach used in *Omni*, *Westborough Mall* and *Whitworth* is preferable to the standard applied by the Tenth Circuit in the instant case. First, the former approach requires a federal court to apply the same analysis and scrutiny to both elements of the test for municipal antitrust immunity. This Court has already set out the strict test for the first element. There is no good policy reason why the same standard should not be applied to both.

Second, the *Omni*, *Westborough Mall* and *Whitworth* approach advances the federal policy against trade restraints expressed in the Sherman Act. This Court has consistently held that exemptions from federal antitrust law are to be narrowly construed. *Patrick v. Burget*, 486 U.S. 94 (1988); *California Retail Liquor Dealers Association v.*

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supervision requirement stems from the recognition that "[w]here a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State." *Patrick*, 486 U.S. at 100, *quoting Hallie*, 471 U.S. at 47.

To the extent that the lower courts have broadened the state-action exemption to apply to BCED without reference to the *Patrick* standard, this error should be corrected upon remand.

[21] For a similarly relaxed level of review see *Scott v. City of Sioux City*, 736 F.2d 1207, 1214-17 (8th Cir. 1984), *cert. denied*, 471 U.S. 1003 (1985) and *Boone v. Redevelopment Agency of San Jose*, 841 F.2d 886 (9th Cir. 1988), *cert. denied*, 109 S.Ct. 489 (1988).

Midcal Aluminum, Inc., 445 U.S. 97 (1980); *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); *California v. Federal Power Commission*, 369 U.S. 482 (1962). A relaxed standard permits a municipality to fabricate immunity for itself by facially complying with a state statute, as the municipal defendants did here. Municipalities could pursue whatever purposes they wished, disregarding or even contravening clearly expressed state policy, and still be insulated from antitrust liability. The threat of "serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws," *Lafayette*, 435 U.S. at 412-13, would soon come about.

Finally, federal courts applying the lower standard routinely refer to lack of compliance with state statutes as a matter for state court action. *See, e.g.*, Appendix C at 40a; *Boone v. Redevelopment Agency of City of San Jose*, 841 F.2d 886, 891-92 (9th Cir. 1988), *cert. denied*, 109 S.Ct. 489 (1988); *Scott v. City of Sioux City*, 736 F.2d 1207, 1215-16 (8th Cir. 1984), *cert. denied*, 471 U.S. 1003 (1985). This practice ignores the fact that the determination of whether or not immunity from the federal antitrust laws exists is, of necessity, a question squarely before the federal courts.

B. The Depth of BCED's Involvement in the Unauthorized Anticompetitive Conduct Precludes the Protection of *Noerr-Pennington* Immunity.

In this case, the municipal defendants operated essentially as an arm of BCED. BCED designed Centerstone, determined to construct the project on the plaintiffs' property, devised public financing methods and sought condemnation powers to eliminate the market for

the property. BCED then prevailed upon the municipal defendants to join with it to ratify and carry out its plans. Both BCED and the municipal defendants knew that the plans were unauthorized by Colorado law and consequently illegal. These facts offer the opportunity to define the outer limits of the *Noerr-Pennington* doctrine and to address the co-conspirator exception frequently discussed by the lower courts.

Noerr-Pennington immunity is derived from the First Amendment right to petition the government for redress of grievances, as well as from the First Amendment right of free association. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). *See Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499 (1988). Consequently, it allows private parties to use the channels and procedures of government agencies to advocate their causes and points of view respecting their economic interests vis-a-vis their competition. *California Motor Transport*, 404 U.S. at 510-11. The circuit courts of appeal and the district courts remain in disagreement as to the scope of the exemption offered by the doctrine.

One issue frequently raised in the lower courts is the prospect of a "co-conspirator exception" to *Noerr-Pennington* immunity from anti-trust liability. As generally expressed, this exception to the *Noerr-Pennington* doctrine provides that efforts to influence administrative officials for an anti-competitive purpose violate the Sherman Act if a public official is a participating member of the conspiracy. The doctrine rests on the very real distinction between, on the one hand, groups of private parties banding together to lobby public officials for a commercial advantage, and, on the other, public officials joining

with private parties to obtain a trade restraint through governmental action.

Some circuits have adopted the "co-conspirator exception" to *Noerr-Pennington*. *See, e.g., Affiliated Capital Corp. v. Houston*, 735 F.2d 1555, 1567 (5th Cir. 1984), *cert. denied sub nom. Gulf Coast Cable Television Co. v. Affiliated Capital Corp.*, 474 U.S. 1053 (1986). (Public co-conspirator exception applied where mayor and city council cooperated with cable companies in defining territories); *Duke & Co. v. Foerster*, 521 F.2d 1277, 1282 (3rd Cir. 1975) (*Noerr-Pennington* doctrine inapplicable because official participation with private individuals in scheme to restrain trade was alleged). See also *Central Telecommunications, Inc. v. City of Jefferson City*, 589 F. Supp. 85, 90 (W.D. Mo. 1984); *Campbell v. City of Chicago*, 577 F. Supp. 1166, 1179 (N.D. Ill. 1983); *Richard Hoffman Corp. v. Integrated Building Systems, Inc.*, 581 F. Supp. 367, 374 (N.D. Ill. 1984).

In the case below, the Tenth Circuit side-stepped the issue.[22] Appendix A at 13a. Other circuits have done likewise. *See, e.g., Omni Outdoor Advertising*, 891 F.2d at 1139. The Seventh and Ninth Circuits have declined to adopt the exception. *Metro Cable Co. v. CATV of Rockford,*

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[22] The Tenth Circuit opinion held that the *Noerr-Pennington* doctrine applied. However, it is unclear as to whether or not the court believes the doctrine affects the liability of the municipal defendants, as well as that of BCED. Appendix A at 14a. The district court opinion treats the liability and immunity of all defendants as interchangeable. Appendix C at 34a.

To the extent the lower court opinions fail to recognize the doctrine may not be applied to municipal defendants, these opinions should be corrected. Even if the private party here is protected by *Noerr-Pennington*, it does not follow that the state entities are also immunized.

Inc., 516 F.2d 220, 230 (7th Cir. 1975); *Boone*, 841 F.2d at 897. *But see Harman v. Valley National Bank of Arizona*, 339 F.2d 564, 566 (9th Cir. 1964) (Acknowledging possibility of co-conspirator exception).

The co-conspirator exception is viable from both a logical and legal standpoint, at least on the facts presented in this case. Private defendants who intentionally engage in an illegal antitrust conspiracy should not be immunized from allegations of participating in an illegal antitrust conspiracy simply because their co-conspirators happen to be officials of a municipal agency. Such actions fall outside the ambit of legitimate and protected governmental activities, outside the scope of appropriate petitioning activity, and consequently, outside of the protection of *Noerr-Pennington*.

II. THE TENTH CIRCUIT PERMITTED THE DEFENDANTS TO ESCAPE CIVIL RIGHTS LIABILITY FOR THE UNAUTHORIZED CONDEMNATION OF PLAINTIFFS' LAND.

Before summary judgment was entered against the plaintiffs, they showed that the defendants sought to condemn their land under color of the Colorado Urban Renewal Act, and that, as a consequence, they were deprived of property rights protected by the United States Constitution. The record contains substantial evidence that the commissioning of the blight study and the adoption of the plan were undertaken by the City and DURA under color of state law. The evidence is also clear that, while purporting to act within the authority of the Colorado Urban Renewal Act, they were, in fact, acting in contravention of state policy and misusing their powers.

Nonetheless, the Tenth Circuit affirmed the trial court's dismissal of the civil rights claim. In its review, the Tenth Circuit held that the appropriate question was whether *any* proper purpose existed for the urban renewal plan. It determined that whether the action was authorized by state law was not part of the inquiry before the court. Appendix A at 15a.

The Tenth Circuit approach to the issue again ignores the distinction, often noted by this Court, between states and municipalities in our federal system of government. Under our dual system of government, "states are sovereign, save only as Congress may constitutionally subtract from their authority." *Parker v. Brown*, 317 U S. at 351. Thus, state legislation rationally related to a public purpose should be upheld even if it interferes with private property rights. *See, e.g., Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984); *Berman v. Parker*, 348 U.S. 26 (1954). However, "[c]ities are not themselves sovereign; they do not receive all the federal deference of the States that create them." *Lafayette*, 435 U.S. at 412.

Where municipal and private parties purport to act in accordance with a state statute in taking private property, a federal court should determine whether the municipality's activity comported with the authorizing state legislation. To do otherwise would test the municipal action taken under color of state law as if it were the state law itself.

Here, the defendants sought to use urban renewal condemnation power to facilitate construction of a showcase project in downtown Denver. At best, their purpose was to revive downtown Denver's retail business climate

– not eliminate blight, the only proper statutory purpose under the Colorado Urban Renewal Act. Record, Respondents' Tenth Circuit Response Brief at 41. Testing their actions by a rational basis standard means that cities and co-conspirators can act without any statutory authorization to take private property, without fear of liability under the Civil Rights Act.

This result violates the fundamental policies underlying civil rights law. The infringement on civil rights is no less when an actor moves under color of state law, but without any state authorization, than when it acts for a private rather than a public purpose.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

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June 1990

APPENDIX

APPENDIX A

[OPINION OF UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT]

DONALD OBERNDORF; LEO STERN; HARRY PAUL WERTHEIMER; CAROL BRODIE, Trust Administrator for Edith O. Wertheimer Trust; DOTTIE HAMMEL; and BLOCK 173 ASSOCIATES, a Colorado General Partnership,

Plaintiffs-Appellants,

v.

THE CITY AND COUNTY OF DENVER; THE CITY COUNCIL OF THE CITY & COUNTY OF DENVER, by its council members of the City Council (not as individuals but as members of the City Council), T.J. Hackworth, J.L. Sandos, Stephanie A. Foote, Paul L. Swalm, John J. Silchia, Nieves Peres McIntire, Hiawatha Davis, Jr., Salvadore Carpio, Cathy Donohue, William R. Roberts, Robert L. Crider, Cathy Reynolds, William A. Scheitler; THE DENVER URBAN RENEWAL AUTHORITY; FEDERICO PENA, as Mayor of the City and County of Denver; and BCE DEVELOPMENT PROPERTIES, INC., a Colorado corporation fka OXFORD PROPERTIES, INC.,

Defendants-Appellees.

Nos. 88-2599
88-2928

Cite as 900 F.2d 1434 (10th Cir. 1990)

Appeal from the United States District Court
For the District of Colorado
D.C. Nos. 86-C-1075 and 86-C-1445

James A. Clark of Baker & Hostetler (Bruce D. Pringle and Theodore Shih of Baker & Hostetler; Kenneth L. Starr and Michael Touff of Holmes & Starr, with him on the briefs), Denver, Colorado, for Plaintiffs-Appellants.

David R. Hammond of Davis, Graham & Stubbs (Dale R. Harris and Neil Peck of Davis, Graham & Stubbs; Stephen H. Kaplan, City Attorney; Robert M. Kelly, Donald E. Wilson, and Karen A. Aviles, Assistant City Attorneys; Marlin D. Opperman, William M. Schell and Linda A. Surbaugh of Opperman & Associates, P.C., with him on the briefs), Denver, Colorado, for Defendants-Appellees.

Before **McKAY, MOORE,** and **ANDERSON,** Circuit Judges.

MOORE, Circuit Judge.

Plaintiffs-appellants appeal a summary judgment order which dismissed with prejudice all of their antitrust and civil rights claims against the defendants. We conclude that the district court properly found that there was no genuine issue of material fact in dispute. Because that court correctly applied the substantive law, we affirm.

I.

This case arises from the proposed Centerstone redevelopment project in downtown Denver. The plaintiffs-appellants, the Oberndorf family and Block 173 Associates (landowners), opposed the project which would have been constructed in part on their land.[1] The landowners also objected to the corresponding urban renewal plan adopted by the Denver Urban Renewal Authority (DURA) and the Denver City Council from which the Centerstone project emanates. The defendants-appellees are the City and County of Denver (the City), the City Council, Federico Pena, the Mayor of the City and County of Denver, Colorado, DURA, (collectively the Municipal defendants); and BCE Development Properties, Inc. (BCED). Seeking injunctive relief, a declaratory judgment, and damages, landowners claim alleged antitrust violations based on §§ 1 and 2 of the Sherman Anti-Trust Act, 15 U.S.C. §§ 1 and 2 and alleged civil rights claims under 42 U.S.C. § 1983. The district court's thorough recitation of the facts of this case obviates further recitation here. *See Oberndorf v. City and County of Denver*, 696 F. Supp. 552, 554-56 (D. Colo. 1988). Therefore, we set out only those facts which are essential for this opinion.

In early 1983, the City and the Denver Partnership, Inc. (DPI), a non-profit civic and downtown business organization, began courting national retail developers and department stores in an effort to revitalize downtown Denver. City officials and DPI determined that

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[1] Subsequent events call into question whether the project will be completed, but neither party has suggested this case is consequently moot.

some sort of public/private partnership with substantial public financing would be necessary to create a multi-block retail project on the Sixteenth Street Mall. In the summer of 1983, DPI formed the Sixteenth Street Retail Development Task Force to assist in forming such a partnership. Although the City and DPI contacted several potential developers, only BCED demonstrated sufficient interest and capacity to develop such a project. BCED proposed a two or three-block project to be constructed on Blocks 196, 173, and 206, including the block on which an existing department store is now located.

Following a December 1984 announcement by Mayor Pena and BCED about the proposed Centerstone project, discussions among the City, BCED and others continued, focusing on available forms of public financing. It was determined that the best method was "tax increment financing," a form of public funding that allows sale of municipal bonds to raise money for public improvements. Under Colorado law, this funding vehicle is available only as part of an urban renewal plan. *See Urban Renewal Auth. v. Byrne*, 618 P.2d 1374 (Colo. 1980). The City began taking actions to adopt an urban renewal plan as set forth at Colo. Rev. Stat. §§ 31-25-101-115 (1986).

Critical to the entire project are the provisions of Section 31-25-107(1) that no urban renewal plan shall be undertaken unless the appropriate authority, here the City Council, determines that the area is blighted. In December 1985, the City Council passed a resolution ordering DURA to begin preparing an urban renewal plan and conducting a blight study to analyze a fifteen-block area in downtown Denver. In March 1986, the study concluded, finding numerous blight factors existed in the

defined space. DURA also prepared a proposed urban renewal plan for the fifteen-block area.

In May 1986, the City Council considered the proposed urban renewal plan at a public meeting. Landowners and their representatives appeared and opposed the plan, disputing the existence of blight in the area. Enacting Ordinance 309, the City Council approved the plan.

In August 1987, DURA issued an Offering Prospectus and solicited proposals from prospective developers for redevelopment of all or part of the fifteen-block urban renewal area. Four prospective developers submitted proposals, but only those of BCED concerned the blocks on which BCED hoped to build the Centerstone project. DURA selected BCED and Centerstone for Phase I of the urban renewal plan.

Landowners then began this action, claiming the defendants illegally conspired to misrepresent the three-block area as blighted so that the property could be condemned under the Colorado Urban Renewal Law. They further claimed the urban renewal plan eliminated competition among buyers and developers in the three-block real estate market and thus amounted to a restraint of trade in violation of §§ 1 and 2 of the Sherman Anti-Trust Act. Landowners also asserted claims under 42 U.S.C. § 1983 that the plan was a regulatory taking of property in violation of the due process and equal protection clauses of the Constitution.

Following discovery, all defendants filed summary judgment motions which the district court granted, dismissing all of the landowners' claims with prejudice.

Oberndorf, 696 F. Supp. at 561. Shortly thereafter, the district court granted defendant DURA's motion to dismiss its counterclaims, and final judgment was entered for the defendants and against landowners. The landowners appeal the summary judgment order.

II.

This court reviews a summary judgment order *de novo*. *Burnette v. Dow Chemical Co.*, 849 F.2d 1269, 1273 (10th Cir. 1988). We review the record in the light most favorable to the non-moving party to determine if a genuine issue of material fact was in dispute; if not, we must determine if the substantive law was correctly applied. *Osgood v. State Farm Mut. Auto. Ins. Co.*, 848 F.2d 141, 143 (10th Cir. 1988).

A. STATE ACTION IMMUNITY UNDER ANTITRUST LAWS

In *Parker v. Brown*, 317 U.S. 341 (1943), the Supreme Court held that the Sherman Act did not apply to the anticompetitive conduct of a state acting through its legislature. Subsequently, the Court rejected the proposition that municipalities are similarly immune from antitrust liability simply by their status as subdivisions of the state. *City of Lafayette, La. v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978). Rather, to obtain exemption, municipalities must demonstrate that their anticompetitive activities were authorized by the state "pursuant to a state policy to displace competition with regulation or monopoly public service." *Id.* at 413. The municipality need not point to a specific, detailed legislative authorization, but

must show that it acted in accordance with a "clearly articulated and affirmatively expressed . . . state policy" to displace competition with regulation. *Id.* at 410, 415. *See also Community Communications Co. v. City of Boulder, Colo.*, 455 U.S. 40, 51-52 (1982). "A state policy is considered clearly articulated and affirmatively expressed if the statutory provision empowering the municipality's action plainly shows that 'the legislature contemplated the kind of action complained of.' " *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 44 (1985) (quoting *City of Lafayette, La.*, 435 U.S. at 415).

The district court found the cited actions of the defendants complied with the requirements of the Colorado Urban Renewal Law and were undertaken pursuant to a clearly articulated and affirmatively expressed state policy as embodied in that law. Therefore, the district court held that the defendants were immune from liability and granted summary judgment. In addition, the court found that the evidence of conspiracy produced by the landowners did not reach the required threshold level and that the undisputed evidence indicated that the defendants' actions were consistent with their permissible independent interests in pursuing the Centerstone project as an effort to revitalize the Denver economy.

Arguing that the district court refused to consider evidence that the legislative record was a sham, landowners contend that the district court applied the wrong legal standard by limiting consideration to a facial review of the legislative record made by the City Council and DURA. We conclude that the district court adequately considered all of the evidence and affirm the district

court's holding that state action immunity protects the Municipal defendants and BCED.

Under the tests pronounced in *City of Lafayette* and *Boulder, supra,* we must consider two prerequisites to proper application of the state action exception to municipal action. We must first determine whether the Colorado General Assembly, through the Colorado Urban Renewal Law, authorized the challenged actions of the defendants. In addition, we must determine whether the legislature intended to displace competition with regulation. *See* P. Areeda & H. Hovencamp, *Antitrust Law* ¶ 212.3a (Supp. 1988). In this case, it is undisputed that the Colorado Urban Renewal Law represents a clearly articulated and expressly stated policy to displace competition. *See, e.g., Rabinoff v. District Court In and For City and County of Denver,* 145 Colo. 225, 234, 360 P.2d 114, 119 (1961) (describing how the Colorado Urban Renewal Law operates by condemnation of private property for public use or transfer to private ownership to be used for public purposes); *c.f. Scott v. City of Sioux City, Iowa,* 736 F.2d 1207, 1213 (8th Cir. 1984) (discussing how Iowa legislation contemplated that competition would be displaced by the operation of the Iowa urban renewal law), *cert. denied,* 471 U.S. 1003 (1985). Therefore, the focus of the inquiry is whether the City's actions were authorized by the Colorado Urban Renewal Law.

To support their contention that the City acted beyond the scope of the statute, landowners claim that defendants were not attempting to eliminate blight as required by the Colorado Urban Renewal Law. Specifically, landowners point out that no blight was found on

the three downtown blocks which would compose Centerstone. They allege that defendants expanded the target area to fifteen blocks to compensate for the lack of blight in Blocks 173, 208 and 196. Landowners claim that the larger area was needed to generate tax increment financing funds necessary to deliver the approximately $60 to $80 million subsidy to BCED. In addition, landowners contend the Centerstone committee chose the larger area to avoid anticipated adverse changes to the tax-exempt status of bonds brought about by the 1986 Tax Reform Act. Landowners allege the Centerstone committee was counseled that a smaller district, directed only at Centerstone, might be declared illegal; hence, it chose to expand the area to be developed. After reviewing the record, we conclude that the lack of blight on the Centerstone blocks and the landowners' asserted reasons defendants created the fifteen-block area are not sufficient to prove the blight study was a sham. We agree with the district court that the blight study comported with the statutory definition of "blighted area" as set forth in Colo. Rev. Stat. § 31-25-103(2) (1986). As the district court explained, blight need not exist on every block of the area examined. As interpreted by the Colorado Court of Appeals, the statutory definition of blight "is broad and encompasses not only those areas containing properties so dilapidated as to justify condemnation as nuisances, but also envisions the prevention of deterioration." *Tracy v. City of Boulder*, 635 P.2d 907, 909 (Colo. App. 1981).

Claiming that BCED was selected as the developer of Centerstone long before the use of urban renewal was even contemplated, the landowners contend the selection procedure illustrates how the use of urban renewal was a

sham. Landowners argue that the usual process of urban renewal requires that a developer be selected after council adoption of a plan and through a competitive bidding process.

Rejecting this contention, the district court held the fact that "defendant BCED may have been identified as the 'first choice' developer of the Centerstone Project before the financing method was selected and before the blight study was conducted, does not violate any statutory provision with respect to implementation of an urban renewal plan under Colorado law." *Oberndorf*, 696 F. Supp. at 559. We agree. Following the adoption of the urban renewal plan according to the procedures of Colo. Rev. Stat. § 31-25-107, DURA sent out a prospectus and conducted a competitive bidding process as described in Colo. Rev. Stat. § 31-25-106(2) (1986). DURA's selection of BCED does not by itself show that the process was a sham. Furthermore, the realities of the urban renewal process require early developer involvement to determine whether a public/private partnership is feasible. Consultation with BCED and other developers before the adoption of the urban plan merely gave the City information whether urban renewal and tax increment financing were appropriate mechanisms for revitalizing this section of downtown Denver.

Finally, landowners allege other indications that the Centerstone committee accomplished its goals in a dishonest manner. They suggest that at least one council member may have received financial gain from BCED. In addition, they contend that BCED "misrepresented" to the council its plans for condemnation and misled the public by the $60 to $80 million figures identified as the

City's commitment when, in fact, the subsidy could be as much as $216.8 million of revenues otherwise available to the City. However, these allegations are not supported by sufficient evidence nor do landowners show how these instances of misrepresentation relate to their claims that the urban renewal plan was not authorized by state law. We agree with the district court that the Colorado Urban Renewal Law grants municipal officials authority to combat blight and authorizes DURA to facilitate redevelopment through urban renewal plans.

Because we affirm the district court's finding that the Municipal defendants were authorized by and acted in accordance with this affirmatively expressed state policy, we affirm the district court's conclusion that state action immunity applies.

B. *NOERR-PENNINGTON* DOCTRINE

Even assuming that the landowners have shown evidence of conspiracy and antitrust injury, the *Noerr-Pennington* doctrine provides immunity to BCED in this case. Based upon the protections of the First Amendment, the *Noerr-Pennington* doctrine exempts from antitrust liability any legitimate use of the political process by private individuals, even if their intent is to eliminate competition. *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). In its summary judgment order, the district court implicitly held that BCED's activities were "mere solicitation of government action" protected by the *Noerr-Pennington* doctrine. We agree.

Immunity under the *Noerr-Pennington* doctrine is designed to protect the right to petition and engage in political activity. *Instructional Systems Dev. Corp. v. Aetna Cas. & Sur. Co.*, 817 F.2d 639, 650 (10th Cir. 1987). *Noerr-Pennington* protects rights of association and petition, which would be denied if groups with common interests could not, without violating the antitrust laws, use the channels and procedures of government agencies to advocate their causes and points of view respecting resolution of their business and economic interests *vis-a-vis* their competitors. *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972).

In this case, the actions of BCED fall squarely within the doctrine. When BCED participated in the Centerstone committee and met with City Council members, BCED merely represented its own business and economic interests in the proposed revitalization of downtown Denver. BCED's project proposals, models of Centerstone, comments on tax increment financing, and meetings with city officials were a legitimate use of the political process and the very kind of speech protected by *Noerr-Pennington*.

In *Boone v. Redevelopment Agency of San Jose*, 841 F.2d 886 (9th Cir.), *cert. denied*, 109 S. Ct. 489 (1988), the Ninth Circuit considered similar antitrust allegations that a developer and city officials had shadowy secret meetings and covert agreements in connection with the amendment of an urban renewal plan. The Ninth Circuit held that the conduct was protected by *Noerr-Pennington*, explaining that "[t]he redevelopment process by its very nature, allows for ex parte deliberations between decisionmakers and advocates of a particular view." *Id.* at 895.

We reject landowners' contentions that BCED's conduct falls within two exceptions to *Noerr-Pennington* immunity.

1. Co-conspirator exception

Landowners argue that this court should adopt a "co-conspirator" exception to *Noerr-Pennington* and deny private participants protection where government officials or entities are co-conspirators in a scheme violative of the antitrust laws. *See Affiliated Capital Corp. v. City of Houston*, 735 F.2d 1555, 1566 (5th Cir. 1984), *cert. denied*, 474 U.S. 1053 (1986), and *Duke & Co., Inc. v. Foerster*, 521 F.2d 1277, 1281-82 (3d Cir. 1975). However, *Noerr-Pennington* cannot be circumvented by merely alleging that a government official was involved in the alleged conspiracy. *Boone*, 841 F.2d at 897. We agree with the district court's conclusion that the landowners have not submitted any evidence indicating that any "deal" was made, bribe taken, or illegal conspiracy formed between the Municipal defendants and BCED. The landowners' allegations of secret meetings and covert agreements between the City and BCED are not supported by sufficient evidence of a conspiracy such that a possible co-conspirator exception be considered. Therefore, we need not address whether to adopt a "co-conspirator" exception to *Noerr-Pennington*.

2. "Illegal Activity" exception

In addition, landowners argue that *Noerr-Pennington* immunity should not be extended because BCED engaged in illegal or fraudulent activities separate and apart from

any lobbying activities. *Noerr-Pennington* does not provide immunity where legitimate lobbying efforts are accompanied by illegal or fraudulent actions. *See Westborough Mall, Inc. v. City of Cape Girardeau, Mo.*, 693 F.2d 733, 746 (8th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983). Landowners allege that BCED entered into covert agreements with the City which were unlawful and an abuse of the power delegated to the City under the Urban Renewal Law. Therefore, they contend that BCED cannot take advantage of *Noerr-Pennington*.

The district court correctly held that the state legislature authorized defendants' actions, and, consequently, there was no illegal activity. Moreover, alleged violation or misuse of an urban renewal law does not constitute the kind of illegal activity which can deprive a private party of *Noerr-Pennington* protection. *See Boone*, 841 F.2d at 891, 893-97 (affirming dismissal based on *Noerr-Pennington* doctrine despite allegations that the redevelopment law was illegally used to redevelop non-blighted area). Although bribery, or misuse or corruption of governmental processes are outside the protection of the *Noerr-Pennington* doctrine, *Instructional Systems Dev. Corp. v. Aetna Cas. and Sur. Co.*, 817 F.2d at 650, landowners do not allege any of these illegal activities.

C. CIVIL RIGHTS CLAIMS

The district court granted summary judgment in favor of defendants on landowners' civil rights claims, finding that there was not enough evidence to support their claim for a violation of civil rights and that the City's condemnation of plaintiffs' property was rationally

related to a public purpose. Relying upon *Berman v. Parker*, 348 U.S. 26 (1954), the district court concluded the adoption of an urban renewal plan was a legislative act and that in order to establish an unconstitutional "taking," the landowners had to establish that no public purpose existed for the proposed urban renewal project. Because the district court found that the urban renewal plan was rationally related to the economic revitalization of downtown Denver, the district court held that no unconstitutional "taking" of landowners' property occurred.

Landowners appeal this ruling, arguing that the proper inquiry was whether the urban renewal plan sought to accomplish the purpose authorized by the Colorado Urban Renewal Law. Claiming that the district court's ruling ignored legal distinctions between states and municipalities, landowners contend that state authorization is an essential issue because cities are not entitled to the same deference as states.

We reject these arguments. The district court applied the proper standard when it inquired whether a proper purpose existed for the urban renewal plan, which was created by the legislative acts of DURA and the City Council. Whether the action was authorized by state law is a separate issue and is not part of the inquiry before the court when it looks for a rational relationship to a legitimate public purpose.

The Supreme Court has held that the adoption of an urban renewal plan is a legislative act which must be upheld if there is any public purpose underlying it: "But the means of executing the project are for [the legislature and the legislature] alone to determine, once the public

purpose has been found." *Berman v. Parker*, 348 U.S. at 33. In *Rosenthal & Rosenthal Inc. v. New York State Urban Dev. Corp.*, 771 F.2d 44 (2d Cir. 1985), *cert. denied*, 475 U.S. 1018 (1986), the Second Circuit affirmed the dismissal of a civil rights suit that sought to enjoin the condemnation of plaintiffs' land under an urban renewal plan. Claiming that their property was in no way blighted, these plaintiffs alleged that a private real estate developer, an urban renewal agency, and various city officials violated plaintiffs' civil rights by wrongfully including plaintiffs' land in an urban renewal plan. The Second Circuit affirmed the dismissal of the complaint, holding that so long as the urban renewal legislation was "rationally related to a conceivable public purpose," the plan was valid and did not violate plaintiffs' civil rights. *Rosenthal & Rosenthal Inc.*, 771 F.2d at 46. The Ninth Circuit reached the same conclusion in *Boone v. Redevelopment Agency of San Jose*, 841 F.2d at 892-93, rejecting equal protection and due process challenges to an urban renewal plan:

> [Plaintiffs] have not alleged that the interest of the city and agency in urban redevelopment is illegitimate. Such a claim would be patently frivolous. Moreover, the municipality's regulation of parking is facially "rationally related" to the ends of urban renewal. Thus we find no violation of the [plaintiffs'] equal protection or substantive due process rights.

Accord Scott v. City of Sioux City, Iowa, 736 F.2d at 1216 (affirming summary judgment on substantive due process and equal protection claims because there was a public purpose for the challenged urban renewal ordinance).

The district court also properly concluded that elimination of urban blight and economic revitalization of

Denver were legitimate public purposes underlying the plan. In reviewing whether legislative power is exercised for a public purpose, this court exercises narrow authority. "It is not for the court to oversee the choice of the boundary line nor to sit in review on the size of a particular project area." *Berman, supra,* 348 U.S. at 35-36. Colorado has long recognized that the acquisition of property for the planned elimination of urban blight constitutes a public purpose. *Rabinoff v. District Court,* 145 Colo. at 234, 360 P.2d at 119. Similarly, in *Thornton Development Authority v. Upah,* 640 F. Supp. 1071 (D. Colo. 1986), the court upheld the condemnation of the plaintiff's land for urban renewal because statutorily recognized public purposes were the stated basis for the Thornton Development Authority's action. The court explained, "In this case such public purposes as increasing revenues, sales, commerce and employment cannot be gainsaid. The wisdom of decisions made in effectuating such purposes is not a matter given to the courts in our system to consider." 640 F. Supp. at 1081.

Landowners also argue that the district court improperly concluded that the landowners' claims that the defendants violated the Colorado Urban Renewal Law belong in state court and not in federal court. The district court ruled that whether defendants' actions complied with every detailed provision of the Urban Renewal Law in this instance was not properly before it in the context of the federal claims asserted. We agree with the district court that the violation of state law, if any, does not necessarily constitute a violation of the plaintiffs' constitutional claims. *Rosenthal & Rosenthal Inc.,* 605 F. Supp. at 618 (S.D.N.Y.), *aff'd,* 771 F.2d 44 (2d Cir. 1985), *cert. denied,*

475 U.S. 1018 (1986). Similarly, we agree that the defendants "do not forfeit their immunity [under antitrust laws] merely because their execution of the powers granted to them under the redevelopment act may have been imperfect in operation." *Boone*, 841 F.2d at 892; *see also* P. Areeda & H. Hovencamp, *supra*, at ¶ 212.3b.

Although landowners allege that the public purposes set forth for the plan are fraudulent and that the Plan favored BCED, we do not find sufficient evidence in the record to support the landowners' claim for a violation of civil rights or their claim of conspiracy. The district court's order granting summary judgment is **AFFIRMED.**

APPENDIX B

[JUDGMENT OF UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT]

DONALD OBERNDORF; LEO STERN; HARRY PAUL WERTHEIMER; CAROL BRODIE, Trust Administrator for Edith O. Wertheimer Trust; DOTTIE HAMMEL; and BLOCK 173 ASSOCIATES, a Colorado General Partnership,	)	
Plaintiffs - Appellants,	)	
v.	)	
THE CITY AND COUNTY OF DENVER; THE CITY COUNCIL OF THE CITY & COUNTY OF DENVER, by its council members of the City Council (Not as individuals but as members of the City Council, T.J. Hackworth, J.L. Sandos, Stephanie A. Foote, Paul L. Swalm, John J. Silchia, Nieves Peres McIntire, Hiawatha	)	88-2599 88-2928 D.C. # 86-C-1075 86-C-1445

Davis, Jr., Salvadore Carpio, Cathy Donohue, William R. Roberts, Robert L. Crider, Cathy Renolds, William A. Scheitler; THE DENVER URBAN RENEWAL AUTHORITY; FREDERICO PENA, as Mayor of the City and County of Denver; BCE DEVELOPMENT PROPERTIES, INC., a Colorado corporation fka OXFORD PROPERTIES. INC.,

Defendants - Appellees.

JUDGMENT
Entered March 29, 1990

Before McKAY, MOORE and ANDERSON, Circuit Judges.

This cause came on to be heard on the record on appeal from the United States District Court for the District of Colorado, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

Entered for the Court
ROBERT L. HOECKER, Clerk
/s/ Patrick Fisher
BY: Patrick Fisher
Chief Deputy Clerk

APPENDIX C

[ORDER AND OPINION OF UNITED STATES DISTRICT COURT, D. COLORADO]

Donald OBERNDORF, Loe [sic] Stern, Harry Paul Wertheimer, Mike Smith, Administrator of the Edith O. Wertheimer Trust, and Dottie Hammel, Plaintiffs.

v.

The CITY AND COUNTY OF DENVER, The City Council of the City and County of Denver, by its Council Members (not as individuals, but as members of the City Council), T.J. Hackworth, M.L. Sandos, Stephanie A. Foote, Paul L. Swalm, John J. Silchia, Nieves Perez McIntire, Hiawatha Davis, Jr., Salvadore Carpio, Cathy Donohue, William R. Roberts, Robert L. Crider, Cathy Reynolds, William A. Scheitler, The Denver Urban Renewal Authority, Federico Pena, Mayor of the City and County of Denver, and BCE Development Properties, Inc., a Colorado corporation, f/k/a Oxford Properties, Inc., Defendants.

BLOCK 173 ASSOCIATES, a Colorado General Partnership, Plaintiff.

v.

The CITY AND COUNTY OF DENVER, The City Council of the City and County of Denver, by its council members T.J. Hackworth, M.L. Sandos, Stephanie Foote, Paul A. Swalm, John Silchia, Nieves Perez McIntire, Hiawatha Davis, Jr., Salvadore Carpio, Cathy Donohue, William R. Roberts, Robert L. Crider, Cathy Reynolds, William A. Scheitler, The Denver Urban Renewal Authority, Federico Pena, as Mayor of the City and County of Denver, BCE

Development Properties, Inc., a Colorado Corporation, f/k/a Oxford Properties, Inc., Defendants.

Nos. 86-C-1075, 86-C-1445.

United States District Court,
D. Colorado.

Sept. 19, 1988.

Cite as 696 F. Supp. 552 (D. Colo. 1988)

Harold A. Feder, Feder, Morris, Tamblyn & Goldstein, P.C., Denver, Colo., for Oberndorf plaintiffs.

James A. Clark, Bruce Pringle, Baker & Hostetler, Denver, Colo., for Block 173 Associates.

Stephen H. Kaplan, City Atty., Robert M. Kelly, Karen A. Aviles, Asst. City Attys., Denver, Colo., for Mun. defendants.

Marlin D. Opperman, Opperman & Associates, Denver, Colo., for DURA

Dale R. Harris, David R. Hammond, Davis, Graham & Stubbs, Denver, Colo., for BCE Development.

ORDER

CARRIGAN, District Judge.

This is an action filed by two groups of plaintiffs who own real property located in downtown Denver, Colorado, to challenge a proposed urban renewal plan. Plaintiffs Block 173 Associates ("the Block 173 plaintiffs"), a Colorado general partnership consisting of descendants of the Cheesman-Evans families, own Block 173 in fee

simple. Block 173, bounded by Fifteenth Street, Glenarm Place, the Sixteenth Street Mall, and Welton Street, is now a parking lot.

The second group of plaintiffs, the Oberndorf family ("Oberndorf plaintiffs"), own a fifty percent interest, as tenants in common with BCE Development Properties, Inc., in four lots situated within Block 196, on the corner of Tremont Street and the Sixteenth Street Mall. This property is leased to small retail businesses.

Defendants are: (1) the City and County of Denver, Colorado ("City"), the City Council, and Federico Pena, the Mayor of the City and County of Denver, Colorado (collectively the "Municipal defendants"); (2) the Denver Urban Renewal Authority ("DURA"); and (3) BCE Development Properties, Inc. ("BCED"). Defendant BCED is a Colorado corporation that owns, or controls under long term leases, all of Block 196 except for the lots owned by the Oberndorf plaintiffs.

The issues before me arise out of two consolidated lawsuits filed by the named plaintiffs. A third action, *Cook et al. v. The City and County of Denver, Colorado, et al.*, Civil Action No. 86-C-1278, has been settled and dismissed.

The Oberndorf plaintiffs' complaint seeks damages for alleged antitrust and conspiracy violations based on §§ 1 and 2 of the Sherman Anti-Trust Act, 15 U.S.C. §§ 1,2 (First Claim) and alleged civil rights violations under 42 U.S.C. § 1983 (Second Claim). It also prays for injunctive relief (Third Claim).

The Block 173 plaintiffs allege claims for violations of civil rights based on § 1983 (First and Second Claims), conspiracy to violate civil rights (Third Claim), and anti-trust and conspiracy violations under the Sherman Anti-Trust Act (Fourth and Fifth Claims). They seek an injunction, declaratory judgment, and damages.

Defendants have moved for summary judgment as to all claims asserted by the plaintiffs. The issues have been fully briefed, counsel have presented extensive oral argument, and all motions are ripe for decision. Subject matter jurisdiction exists under 28 U.S.C. §§ 1331, 1343, and 15 U.S.C. §§ 1, 26.

Plaintiffs' claims arise from an urban renewal project proposed by the Municipal defendants to be constructed in part on the properties owned by the plaintiffs. Defendant BCED is the proposed developer of the project.

In early 1983, the City and the Denver Partnership, Inc. ("DPI"), a nonprofit civic and downtown business organization, began courting national retail developers and department stores in an effort to enhance and revitalize the downtown Denver area. City officials and DPI soon determined that some sort of public/private partnership, with substantial public financial involvement, would have to be formed in order to develop a multi-block retail project downtown. This conclusion was based on such factors as high land costs, lower return for retail projects than for office towers, and the need to make substantial concessions to anchor department store tenants in order to lure them to Denver.

In the summer of 1983, DPI formed the Sixteenth Street Retail Development Task Force to assist in forming

a public/private partnership to construct a multi-block retail project on the Sixteenth Street Mall. Although the City and DPI contacted several potential developers, only the defendant BCED demonstrated sufficient interest and capacity to develop the desired multi-block retail project. BCED proposed a two or three block project on the Mall to be constructed on Block 196, Block 173 and the block on which the May D & F Department Store is now located. In December 1984, the defendants Mayor Pena and BCED held a press conference to announce the plans of BCED and Reliance Development Company, (which then had the development rights to Block 173), to build the "Centerstone Project."

After this announcement, discussions among the City, BCED and others continued, focusing on available forms of public financing. It was determined that the most attractive and promising method was tax increment financing, a form of public funding that allows sale of municipal bonds to raise money for public improvements. It appears undisputed by the parties that urban renewal is the only vehicle available under Colorado law for implementing tax increment financing. *See Urban Renewal Auth. v. Byrne*, 618 P.2d 1374 (Colo. 1980). Colorado's Urban Renewal Law is set forth at Colo. Rev. Stat. §§ 31-25-101 *et seq*. The City thus began taking the actions necessary to adopt an urban renewal plan.

Section 31-25-107(1) of the Urban Renewal Law provides that no urban renewal project shall be undertaken unless the appropriate authority, here the City Council, determines by resolution that the area is blighted or a slum. On December 4, 1985, the City Council's Budget and Finance Committee recommended that the City

Council fund a DURA blight study to analyze a fifteen-block area in downtown Denver that was contemplated to be included in the proposed urban renewal district. On December 16, 1985, City Council Resolution No. 85 was passed at a public meeting. This resolution ordered DURA to begin preparing an urban renewal plan, and to perform a blight study for the fifteen-block area bounded by the Sixteenth Street Mall, Broadway, Cheyenne Place, Colfax and Champa Streets.

DURA solicited proposals from four consulting firms and on February 6, 1986, the DURA Board of Commissioners selected the firm of HOH Associates, Inc. ("HOH") to conduct the blight study.

In March 1986, HOH concluded its study, finding that numerous blight factors existed in the fifteen-block area. However, no blight factors were found to exist in the blocks here at issue now being considered for the Centerstone Project. These blocks, however, are part of the fifteen block area found to be blighted. HOH presented its blight study conclusions to DURA at a public meeting held March 20, 1986.

During this same period, DURA began preparing drafts of the urban renewal plan, with input from the City Council, the Mayor's office, the Denver Planning Office, various City agencies, bond underwriters, BCED and its representatives, area land owners and other interested persons. DURA's proposed urban renewal plan would create an urban renewal district covering the fifteen block area found to be blighted. It authorizes the use of tax increment bonds to finance public improvements, including retail, commercial, and related support facilities, with

developers to be selected through a bidding process. Projects would be constructed pursuant to redevelopment agreements between private developers and DURA, as approved by the City Council. The plan initially gave DURA the power to condemn property but, at the insistence of certain property owners, including the plaintiffs, DURA's condemnation power was limited to the Plan's Phase I and, if the land subject to condemnation was larger than 25,000 square feet, DURA was required to obtain prior City Council approval. The initial Phase I development focused on three blocks, including the property owned by the plaintiffs and BCED.

On April 21, 1986, the Downtown Development Committee of the City Council met with the Denver School Board at a public meeting to discuss the urban renewal plan and tax increment financing. The Denver Planning Board met and reviewed the plan on May 7, 1986, voting to recommend the plan's approval to the City Council. DURA also recommended to the City Council that the plan be approved.

On May 27, 1986, after giving public notice, the City Council considered the proposed urban renewal plan at a public meeting. Plaintiffs and their representatives appeared and opposed the plan, disputing the existence of blight in the area. At the meeting's conclusion, the City Council, by a vote of nine to two, enacted Ordinance 309 approving the urban renewal plan. In the plan, DURA identified several public purposes for the plan's implementation, including renewing and improving the character and environment of the City's central business district, enhancing the sales and property tax base, providing incentive for the private development of retail

shopping and commercial activity within the area, eliminating crime, and improving the economy by stabilizing and upgrading property values. In addition, certain deposition testimony elicited from the Mayor and City Council members indicated that they believed the plan was in Denver's best interest.

In August 1987, DURA issued an Offering Prospectus and solicited proposals from prospective developers for redevelopment of all or part of the fifteen-block urban renewal area. Four prospective redevelopers submitted proposals, but only BCED's proposal concerned the blocks on which BCED hoped to build the Centerstone Project. DURA selected BCED and the Centerstone Project for Phase I of the urban renewal plan.

Plaintiffs contend that the urban renewal plan eliminates competition among buyers and developers in the three-block real estate market and thus amounts to a restraint of trade in violation of §§ 1 and 2 of the Sherman Anti-Trust Act. Plaintiffs also assert that the plan interferes with their protected property rights because it amounts to a regulatory taking of property in violation of the due process and equal protection clauses of the Constitution, actionable claims under 42 U.S.C. § 1983. They further argue, with respect to these claims, that the defendants illegally conspired to misrepresent the three-block area as blighted so that the property could be condemned under the Colorado Urban Renewal Law, to BCED's benefit in pursuing the Centerstone Project.

In support of their respective summary judgment motions, the defendants generally allege that they are immune from liability under the antitrust and civil rights

laws because a public purpose underlies their actions with respect to the urban renewal project, and that their conduct occurred in the context of the legislative decision-making process pursuant to state statutory authority.

Generally, summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), Fed. R. Civ. P.; *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed.2d 265 (1986). In ruling on a summary judgment motion, the court must construe all pleadings, affidavits and admissions in favor of the non-moving party and that party must be given the benefit of all favorable inferences that can be drawn from the evidence. *Bruce v. Martin-Marietta Corp.*, 544 F.2d 442 (10th Cir. 1976). The relevant inquiry is whether there is sufficient disagreement over the evidence to require submitting the case to trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S. Ct. 2505, 2511-12, 91 L. Ed.2d 202 (1986). In *Catrett*, the United States Supreme Court held that Rule 56 mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. 477 U.S. at 322, 106 S. Ct. at 2552.

In the early stages of this litigation, the defendants unsuccessfully moved to dismiss all of the plaintiff's claims. *Oberndorf v. City and County of Denver*, 653 F. Supp. 304 (D. Colo. 1986). Plaintiffs now have had the benefit of discovery, and their claims must be examined in the light most favorable to them based on all the evidence submitted.

A. *Violations of the Sherman Anti-Trust Act.*

To prove a violation of § 1 of the Sherman Anti-Trust Act "unreasonable restraint of trade" prohibitions under the rule of reason analysis, there must be: (1) an agreement among two or more persons or distinct business entities; (2) that is intended to harm or unreasonably restrain competition; (3) and that actually causes injury to the competition. With respect to the injury to competition element, the alleged illegal activities must have an impact upon competition in a relevant market. *Kaplan v. Burroughs Corp.*, 611 F.2d 286, 290-91 (9th Cir. 1979).

Four elements are essential to an "attempt to monopolize" claim under § 2 of the Sherman Anti-Trust Act: (1) a relevant market; (2) a dangerous probability of success in monopolizing the relevant market; (3) specific intent to monopolize; and (4) conduct in furtherance of the attempt. *Shoppin' Bag of Pueblo, Inc. v. Dillon Cos., Inc.*, 783 F.2d 159 (10th Cir. 1986).

To establish a § 1 Sherman Act conspiracy, the evidence must indicate that the alleged conspiracy was calculated to prejudice the public interest by unduly restricting the free flow of interstate commerce. *Larry R. George Sales Co. v. Cool Attic Corp.*, 587 F.2d 266, 275 (5th Cir. 1979). The evidence supporting a § 2 conspiracy claim must establish an agreement, overt acts in furtherance of the agreement, and a specific intent to monopolize any part of interstate commerce. *Instructional Sys. Dev. Corp. v. Aetna Cas. & Sur. Co.*, 817 F.2d 639, 646 (10th Cir. 1987).

In his opinion addressing the defendants' dismissal motions with respect to the plaintiffs' antitrust claims, Judge Kane of this court noted that it would be difficult for the plaintiffs to prove the existence of a conspiracy, or that the three block area at issue is the "relevant market" for purposes of assessing whether the defendants' actions constitute a monopoly. *Oberndorf, supra,* 653 F. Supp. at 309.

My task in deciding the defendants' motions has been made more difficult because the parties do not agree on what issues must be resolved. Defendants argue that their actions had a valid public purpose, and that the means used to achieve that purpose were lawful because they followed all statutory requirements in adopting the urban renewal plan. See brief of the Municipal defendants at 12-15.

Plaintiffs contend, however, that the issue is not whether the urban renewal plan had a legitimate public purpose. Rather, the plaintiffs argue that the defendants did not act in a manner authorized by state statute (Colorado's Urban Renewal Law) in adopting the urban renewal plan, and that the defendants are not immune from anti-trust liability. In support of this argument, the plaintiffs list several acts of misconduct allegedly committed by the defendants.

The factual predicate assumed for the plaintiffs' argument is that the Centerstone Project, and its developer, the defendant BCED, were selected by the Municipal defendants before the urban renewal plan was adopted, as evidenced by Mayor Pena's press announcement. Plaintiffs argue that the the [sic] decision to use tax

increment financing was made after this press announcement. They further contend that the funding decision necessitated the "blight study" because the selected financing method could not be utilized absent an urban renewal project.

Plaintiffs also contend that there were secret meetings between Centerstone's developers and the City. They further emphasize that the area surveyed for blight consisted of fifteen blocks, whereas the Centerstone project required only a two or three block area. This two or three block area, the Centerstone site, was not itself determined to be blighted in HOH's study. Nonetheless, it is argued, the defendant DURA drafted an urban renewal plan that focused on construction of the defendant BCED's Centerstone project. Thus, the plaintiffs argue, the defendants' entire decision-making process was a sham to create the illusion of complying with the statute.

Plaintiffs further emphasize that (1) BCED lobbied for the plan; (2) BCED made political contributions to the Mayor and Council members; (3) BCED drafted the plan; and (4) BCED engaged in promotional activities before the plan was approved. Plaintiffs also cite evidence that a Denver City Councilman may have received a non-disclosed seven and one-half per cent commission on $90,000 worth of business that the defendant BCED gave to a printing company with whom the Councilman worked.

At oral argument, the plaintiffs asserted that the usual procedure under Colorado's Urban Renewal Law is that a deteriorating area will first be investigated, determined to be blighted or a slum, and then designated an

urban renewal area for which tax increment financing is available. Proposed developers for the urban renewal area are then solicited. Here, it is argued, the usual procedure was reversed and the cited acts were accomplished by the defendants in concert to effect an illegal purpose.

The Municipal defendants argue that they are immune under *Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943). In *Parker*, the Court held that, under the Sherman Anti-Trust Act, state officials are entitled to immunity for activities directed by the state legislature, even if those acts have anti-competitive results. *Parker* has been extended to protect municipalities. *Hoover v. Ronwin*, 466 U.S. 558, 104 S. Ct. 1989, 80 L. Ed.2d 590 (1984); *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 102 S. Ct. 835, 70 L. Ed.2d 810 (1982). Alleged anti-competitive acts are shielded if the municipality acted pursuant to a "clearly articulated and affirmatively expressed state policy." *Hoover, supra*, 466 U.S. at 569, 104 S. Ct. at 1995; *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 105 S. Ct. 1713, 83 L. Ed.2d 24 (1985); *Thornton Dev. Auth. v. Upah*, 640 F. Supp. 1071, 1080 (D. Colo 1986).

The Municipal defendants contend that they acted pursuant to a clearly articulated and affirmatively expressed state policy because the Colorado Urban Renewal Law grants municipal officials authority to combat slums and blight. It further authorizes DURA to facilitate redevelopment through urban renewal plans.

Defendant BCED also claims immunity under *Parker* as it has been extended to suits against private developers. *See Scott v. City of Sioux City, Iowa*, 736 F.2d 1207

(8th Cir. 1984); *Boone v. Redevelopment Agency of San Jose*, 841 F.2d 886 (9th Cir. 1988).

Defendant BCED further relies on the *Noerr-Pennington* doctrine, which provides that certain private concerted activities aimed at influencing state action do not violate the Sherman Anti-Trust Act. *Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed.2d 464 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed.2d 626 (1965). Under this doctrine, mere solicitation of government action, even if the sole purpose is to restrain competition, is fully protected by the First Amendment. *Noerr, supra*, 365 U.S. at 138, 81 S. Ct. at 530. However, immunity is not afforded if the defendant's actions bar the plaintiff's access to administrative or judicial proceedings. *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 511, 92 S. Ct. 609, 612, 30 L. Ed.2d 642 (1972).

The *Noerr-Pennington* doctrine applies to legislative proceedings involving urban renewal. "[C]ultivating close ties with government officials is the essence of lobbying" and does not take the plaintiff's claims outside of *Noerr-Pennington*. *Boone, supra*, 841 F.2d at 894-95. Even unethical conduct aimed at influencing city council members has been held immune from suit under the antitrust laws "when conducted in the context of lobbying the City Council as a legislative body." *Rural Electric Co. v. Cheyenne Light, Fuel and Power Co.*, 602 F. Supp. 105, 109 (D. Wyo. 1983).

Colo.Rev.Stat. §§ 31-25-101, *et seq.* set forth the steps necessary to create an urban renewal district and to adopt

an urban renewal plan. The undisputed evidence indicates that the defendants facially complied with all statutory requirements.

Initially, § 31-25-106 provides that the City may transfer or otherwise dispose of real property acquired by it, for urban renewal purposes, to private persons under reasonable competitive bidding procedures. Thus this section contemplates the kind of public/private partnership employed by the Municipal defendants to develop the Centerstone Project.

The determination of blight with respect to the fifteen block area comports with the statutory definition of "blighted area" as set forth in § 31-25-103(2). The statute does not require the existence of blight in every block of the area examined. The definition "is broad and encompasses not only those areas containing properties so dilapidated as to justify condemnation as nuisances, but also envisions the prevention of deterioration." *Tracy v. City of Boulder,* 635 P.2d 907, 909 (Colo. App. 1981).

The proposed plan was reviewed with the City School Board and Planning Commission, and a public hearing was held after the public was afforded appropriate notice. It is undisputed that the plaintiffs appeared at that hearing and presented their opposition to the plan. Moreover, there is sufficient undisputed evidence that the plan was adopted by the City Council upon a determination that it would serve the best interest of the City of Denver. *See,* Colo. Rev. Stat. § 31-25-107.

The Urban Renewal Law does not require the "usual procedure" outlined by the plaintiffs. In other words, the fact that the defendant BCED may have been identified as

the "first choice" developer of the Centerstone Project before the financing method was selected, and before the blight study was conducted, does not violate any statutory provision with respect to implementation of an urban renewal plan under Colorado law.

In his order denying the motions to dismiss, Judge Kane stated that the *Parker* and *Noerr-Pennington* doctrines would not immunize the defendants from acts of bribery or engaging in an illegal conspiracy. *Oberndorf, supra,* 653 F. Supp. at 313 (Order on Motion for Reconsideration). However, the plaintiffs after substantial discovery, have not submitted any evidence indicating that any "deal" was made, bribe taken, or other illegal act committed between the Municipal defendants and the defendant BCED with respect to the adoption or implementation of the urban renewal plan. *See, e.g., Westborough Mall, Inc. v. City of Cape Giradeau, Mo.,* 693 F.2d 733, 743 (8th Cir. 1982).

In *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed.2d 538 (1986), the United States Supreme Court established a two part test for evaluating the propriety of summary judgment in antitrust conspiracy cases. This standard was recently applied in *Gibson v. Greater Park City Co.,* 818 F.2d 722 (10th Cir. 1987), a case involving attempts to develop a condominium and retail shopping area at a ski resort in Park City, Utah. The district court, by granting summary judgment, had dismissed the appellants' conspiracy claims based on alleged violations of the federal antitrust and civil rights laws. The Tenth Circuit Court of Appeals

stated that the appropriate standard set forth in *Matsushita* required an examination of the following two factors:

> "(1) [whether] the plaintiff's evidence of conspiracy [is] ambiguous, i.e., is it as consistent with the defendants' permissible independent interests as with an illegal conspiracy; and, if so, (2) [whether] there is any evidence that tends to exclude the possibility that the defendants were pursuing these independent interests." *Id.* at 724.

In *Gibson*, the appellants attributed a conspiratorial motive to several actions taken by the appellees. In its review, the Tenth Circuit initially examined the various inferences that could be drawn from the appellees' conduct. The Court of Appeals determined that the evidence was "ambiguous," and thus satisfied the first factor of the *Matsushita* test. However, since the appellees' evidence successfully established legitimate business reasons for the conduct, and the appellants' evidence did not sufficiently exclude the possibility that the alleged conspirators acted independently, the district court's decision was affirmed.

I find and conclude that the Municipal defendants' actions, in adopting the urban renewal plan at issue, complied with the requirements of Colorado's Urban Renewal Law. The cited actions by the Municipal defendants, and the defendant BCED, are immune from liability since those actions were taken pursuant to a clearly articulated and affirmatively expressed state policy as embodied in the Urban Renewal Law. *City of Lafayette v. Louisiana Power and Light Co.*, 435 U.S. 389, 98 S. Ct. 1123, 55 L. Ed.2d 364 (1978). Moreover, a violation

of the law, if any, does not defeat state action immunity with respect to the antitrust and conspiracy claims asserted here. *Boone, supra,* 841 F.2d at 891-92.

I further conclude that the evidence of conspiracy produced by the plaintiffs does not reach the threshold level required and that the undisputed evidence indicates that the defendants' actions were consistent with their permissible independent interests in pursuing the Centerstone Project as an effort to revitalize the downtown Denver economy. Defendants respective motions for summary judgment directed against the plaintiffs' antitrust claims are granted.

B. *Civil Rights Claims*

Defendants argue that they are entitled to summary judgment on the civil rights claims because the plaintiffs have not been deprived of any constitutional rights. They argue that: (1) the mere threat of condemnation is not a taking, and (2) a legitimate public purpose underlies the urban renewal plan adopted by the City.

The adoption of an urban renewal plan is a legislative act that must be upheld if it is rationally related to a public purpose. *Berman v. Parker,* 348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954). Even the presence of a conspiracy will not defeat the validity of an urban renewal plan unless the plaintiffs can show that, because of the conspiracy, no conceivable public purpose in fact exists for the urban renewal legislation. To establish an unconstitutional "taking," the plaintiffs must show that no public purpose exists for the proposed urban renewal project. *Boone v. Redevelopment Agency of San Jose,* 841 F.2d 886 (9th Cir.

1988); *Rosenthal & Rosenthal Inc. v. New York State Urban Dev. Corp.*, 771 F.2d 44 (2d Cir. 1985), *cert. denied*, 475 U.S. 1018, 106 S. Ct. 1204, 89 L. Ed.2d 317 (1986); *Scott v. Sioux City, Iowa*, 736 F.2d 1207 (8th Cir. 1984), *cert. denied*, 471 U.S. 1003, 105 S. Ct. 1864, 85 L. Ed.2d 158 (1985).

In evaluating whether legislative power is being exercised for a public purpose, the court exercises an extremely narrow authority. "It is not for the court to oversee the choice of the boundary line nor to sit in review on the size of a particular project area." *Berman, supra*, 348 U.S. at 35-36, 75 S. Ct. at 104.

In *Upah, supra*, 640 F. Supp. 1071 Judge Kane considered the claims of a landowner who alleged that the condemnation of his property pursuant to an urban renewal plan violated his constitutional rights. He rejected the landowner's claims, stating, in pertinent part:

> "Property, . . . , is not absolute. Condemnation for urban renewal purposes is a constitutional limitation on the exercise of property rights. Given its statutory authority, the Thornton Development Authority may engage in activity which results in advantage to one entrepreneur and disadvantage to another so long as a statutorily recognized public purpose is the stated basis for the action. In this case such public purposes as increasing revenues, sales, commerce and employment cannot be gainsaid. The wisdom of decisions made in effectuating such purposes is not a matter given to the courts in our system to consider." *Id.* at 1081.

Colorado has recognized that the acquisition of property for the planned elimination of urban blight constitutes a public purpose. *Rabinoff v. District Court*, 145 Colo.

225, 234, 360 P.2d 114, 119 (1961). Moreover, urban renewal is a legitimate public purpose, notwithstanding private ownership of the property involved. *Tracy*, 635 P.2d at 910. With respect to these actions, the property's diminution in value does not constitute a taking. *Scott, supra*. There is no constitutional right to gain the maximum profit from the use of property. *Nopro Co. v. Town of Cherry Hills Village*, 180 Colo. 217, 504 P.2d 344 (1972).

I have already determined that the Municipal defendants' actions in enacting the urban renewal plan were taken pursuant to a clearly articulated and affirmatively expressed state policy as embodied in Colorado's Urban Renewal Law. I further conclude that the economic revitalization of the downtown Denver area constitutes a legitimate public purpose underlying the urban renewal project. No unconstitutional "taking" of the plaintiffs' property has occurred.

Plaintiffs were afforded due process at every step of the procedure since public hearings were held, notice was afforded, and the plaintiffs participated in those hearings. Plaintiffs have no equal protection claim because the City Ordinance makes no distinction based on any suspect classification nor does it interfere with any fundamental rights.

Whether the defendants' actions complied exactly with every detailed provision of the Urban Renewal Law in this instance is not properly before me in the context of the federal claims asserted. That issue is appropriate for the state court to decide and appears to be before that tribunal as alleged in the plaintiffs' pending state lawsuits. For purposes of this lawsuit, however, a violation of

state law, if any, does not necessarily constitute a violation of the plaintiffs' civil rights. *Snowden v. Hughes*, 321 U.S. 1, 11, 64 S. Ct. 397, 402, 88 L. Ed. 497 (1944); *Rosenthal & Rosenthal, Inc. v. New York State Urban Dev. Corp.*, 605 F. Supp. 612, 618 (S.D.N.Y.), *aff'd*, 771 F.2d 44 (2d Cir. 1985), *cert. denied*, 475 U.S. 1018, 106 S. Ct. 1204, 89 L. Ed.2d 317 (1986).

The evidence before me does not support either the plaintiffs' claim for a violation of civil rights or their claim of a conspiracy. Defendants' motions for summary judgment as to these claims are granted.

Accordingly, it is ORDERED that the defendants' motions for summary judgment are granted. Plaintiffs' complaint and action are dismissed with prejudice. Each party shall bear his or its own costs.

APPENDIX D

[ORDER AND OPINION OF UNITED STATES DISTRICT COURT, D. COLORADO]

Donald OBERNDORF, et al., Plaintiffs,

v.

The CITY AND COUNTY OF DENVER, et al., Defendants.

Civ. A. Nos. 86-K-1075, 86-K-1278 and 86-K-1445.

United States District Court, D. Colorado.

Oct. 29, 1986.

Order on Motion for Reconsideration Jan. 27, 1987.

Cite as 653 F. Supp. 304 (D. Colo. 1986)

Harold A. Feder, Feder, Morris & Tamblyn, James A. Clark, Bruce D. Pringle, Baker & Hostetler, Vicki J. Fowler, Malcolm Murray, Gorsuch, Kirgis, Campbell, Walker and Grover, Denver, Colo. and Richard G. Carlisle, Robert H. Freilich, Kansas City, Mo., for Plaintiffs.

Stephen H. Kaplan, City Atty., Donald E. Wilson, Joel Kohn, Daniel B. Slattery, Asst. City Attys., Denver Colo., for The City and County of Denver, The City Council of the City and County of Denver, and Federico Pena, Mayor.

Marlin D. Opperman, William M. Schell, Opperman & Associates, Denver, Colo., for Denver Urban Renewal Authority.

Dale R. Harris, David R. Hammond, Davis, Graham & Stubbs, Denver, Colo., for BCE Development Properties, Inc.

MEMORANDUM OPINION
AND ORDER

KANE, District Judge.

I.

This case (86-K-1075) has been consolidated with two other cases: 86-K-1278, and 86-K-1445. The list of plaintiffs and defendants follows.

PLAINTIFFS

(1075)
- DONALD OBERNDORF,
- LEO STERN,
- HARRY PAUL WERTHEIMER,
- MIKE SMITH, Admin. for Edith O. Wertheimer Trust
- DOTTIE HAMMEL,

(1278)
- LEONORE COOK,
- ROBERT E. COOK, Trustee of J.R. Cook Irrevocable Trust,
- BARBARA COOK & GARY R. COOK, Trustees of TDG Cook Trust,
- BARBARA COOK & GARY R. COOK, Trustees of J. Cook Residuary Trust,

(1445)
- BLOCK 173 ASSOCIATES, a Colorado General Partnership.

DEFENDANTS
- THE CITY AND COUNTY OF DENVER,
- THE CITY COUNCIL OF THE CITY AND COUNTY OF DENVER, by and through its council members,

- THE DENVER URBAN RENEWAL AUTHORITY,
- FEDERICO PENA, as Mayor of The City of Denver,
- BCE DEVELOPMENT PROPERTIES, INC., a Colorado Corp., f/k/a, Oxford Properties, Inc.

There are three motions to dismiss filed by all defendants. The first is by BCE Development Properties, Inc., f/k/a Oxford Properties, Inc.; the second is by The City of Denver, the City Council of Denver, and Mayor Pena; and, the third is by the Denver Urban Renewal Authority. Each group of defendants [sic] has filed individual responses to these motions and defendants have submitted their respective replies to those responses. Since most of the arguments in all the various motions, responses, and replies are, very often, redundant (hence, the reason for consolidation in the first place) I have organized the discussion according to the significant issues.

II.

This is an action for declaratory and injunctive relief and damages. Plaintiffs argue a proposed urban renewal plan, approved by the city, constitutes an unconstitutional taking of their property and it damages and interferes with their property rights in violation of the due process clause of the Fifth Amendment, and the due process clause and equal protection clause of the Fourteenth Amendment. Plaintiffs also argue the plan violates the antitrust laws of the United States. In support thereof, plaintiffs allege the urban renewal plan misrepresents the

area to be redeveloped as "blighted" and therefore permits the condemnation of their property to the benefit of defendant developer, BCED.

PLAINTIFFS' ALLEGATIONS

In December, 1984, BCED announced plans to develop a retail and office center on a two block area comprised of Block 173 and Block 196 (Block 206 was added in 1986) in downtown Denver called the Centerstone Blocks. BCED stated the project would not be economically feasible without direct public subsidies or tax breaks. Plaintiffs allege that because BCED could not raise enough funds pursuant to the Colorado Urban Renewal Laws or through private means, it, with the help of DURA and the municipal defendants, sought to circumvent the Colorado Urban Renewal Laws by condemning the Centerstone Blocks as a "blighted" or "slum" area. Plaintiffs assert their property is not a "blighted" or "slum" area within the meaning of the statute and further that even if the property were blighted, the BCED project was not a means for the elimination or prevention of the development or spread of blight in accordance with the Urban Renewal Plan.

On February 6 and 10, 1986, respectively, DURA and the municipal defendants arranged for a blight study of the Centerstone Blocks. The study was received and an urban renewal plan prepared, however, plaintiffs allege the plan was neither prepared nor approved by DURA. Plaintiffs further allege that in the four years preceding this action, BCED negotiated and acquired property in

the Centerstone Blocks but never was successful in obtaining certain properties in the Centerstone Blocks, including plaintiffs' property. Accordingly, BCED sought to use the extraordinary powers of eminent domain under the Colorado Urban Renewal law whereby the "needed" properties would be condemned. Plaintiffs allege the instances of poor or substandard conditions designated in the blight survey are readily correctable by enforcement of existing city ordinances. Defendants, nevertheless, intend to condemn plaintiffs property, thus, taking private property for private purposes.

III.

MOTIONS TO DISMISS

There are four basic arguments in this case supporting the motions to dismiss: (1) plaintiffs' civil rights claims fail to state a claim upon which relief can be granted; (2) plaintiffs' antitrust claims fail to state a cause of action; (3) plaintiffs' claims are not ripe for adjudication, and, (4) injunctive relief is not appropriate because plaintiffs have an adequate remedy at law. Finally, there is a suggestion to abstain until the state law claims are decided by Colorado state courts.

(1) PLAINTIFFS' CIVIL RIGHTS CLAIMS FAIL TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

A. Lack of Due Process.

Defendants argue plaintiffs have not been deprived of property without due process of law because there are

adequate state remedies to redress the claimed deprivations. "The Fourteenth Amendment does not protect against all deprivations of property, only against deprivations without due process of law." *Atkinson v. City of Fort Collins,* 583 F. Supp. 567 (D. Colo. 1984) (J. Moore).

Plaintiffs contend defendants' equation of a taking with condemnation ignores cases which have "stated that unreasonable government regulation may constitute a taking in some instances . . . [T]he general rule is that while property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking." *Upah v. Thornton Development Authority,* 632 F. Supp. 1279, 1280-81.

Also plaintiffs are not attacking the Colorado Urban Renewal Law as unconstitutional, they are instead asserting defendants' actions lacked due process because the actions do not comport with the statute or existing common law.

Upah, supra, involved government regulation such as rezoning the land and resubdividing the properties without plaintiff's authorization, creating a special improvement district affecting the land, amending the Urban Renewal Plan without giving notice to the plaintiff, etc., which involve violations amounting to much more than mere questionable condemnation proceedings. Moreover, there is a state law remedy to contest a condemnation proceeding. *Dunham v. Golden,* 31 Colo. App. 433, 504 P.2d 360 (1972). However, plaintiffs assert there is more here than a mere contention with a condemnation proceeding. They are asserting there was and is a conspiracy which violates their due process and equal protection rights and

the condemnation proceedings is the tool by which defendants are injuring plaintiffs. That is to say, the condemnation proceeding is part of the conspiracy. As I stated in *Upah*:

> I am well aware that "[c]laims based merely upon 'assumed potential invasions' of rights are not enough to warrant judicial intervention" . . . In the present case, however, plaintiff's allegations do not rest on the outcome of the condemnation action. Rather, plaintiff has asserted claims based on actions which defendants have allegedly already taken and which purportedly violate plaintiff's rights.

Id., at 1281.

Thus, the motion is denied with respect to this argument.

B. Just Compensation.

Defendants also argue there has been no denial of substantive due process because as long as just compensation is paid, a decision to condemn property for public use is valid. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 104 S. Ct. 2321, 2329, 81 L. Ed.2d 186 (1984). They also cite my recent decision in *Thornton Development Authority v. Upah*, 640 F. Supp. 1071, 1076, 1081 (D. Colo.1986) where I stated so long as a statutorily recognized public purpose is the stated basis for an urban renewal authority's action, it is valid, even if it results in advantage to one entrepreneur, and disadvantage to another. Defendants assert any "underlying motive" is irrelevant as long as a rational basis exists.

Plaintiffs concede claims pursuant to 42 U.S.C. § 1983 seeking just compensation for a taking of property are not ripe for adjudication until the owner has sought such compensation by way of a state inverse condemnation action. (Block 173 Associates brief, p. 12). However, they claim this is not applicable to the instant case.

They are *not* seeking just compensation. Instead, they seek money damages for defendants' interference with their property rights through a series of invalid and fraudulent actions taken in bad faith under color of state law. They also request injunctive relief to free plaintiffs' property from adverse impact of defendants' actions.

In fact, if plaintiffs seek just compensation through inverse condemnation proceedings, then the objective, which defendants' conspiracy was designed to achieve, would be realized.

This last point is key. If plaintiffs now execute their state law remedy, as defendants suggest, then they would be playing right into the scheme defendants have allegedly constructed. There are no further steps available to plaintiffs which might relieve them of the burdens created by the Urban Renewal Plan.

C. Equal Protection of the Laws (§§ 1983 and 1985).

Defendants argue plaintiffs have not been deprived of equal protection under the laws since there has been no allegation of discrimination against a suspect class (race). Plaintiffs' only allegation is that their land is subject to a proposed condemnation while other peoples' land is not. This is simply insufficient.

I explicitly held in *Upah, supra,* that a § 1982 and a § 1985 action require "a racial or perhaps other class-based, invidiously discriminatory animus underlying defendants' actions." I dismissed these claims because there was no such invidiously discriminatory animus.

Regarding the § 1983 claim, I stated in *Upah:*

> defendant's motion is denied, however, with respect to plaintiff's § 1983 claim *since there is no requirement of discrimination necessary to maintain such a cause of action.* (emphasis added).

Obviously, the § 1983 action cannot be dismissed for lack of racial animus, however, the § 1985 claim must be dismissed for that reason. The Oberndorf plaintiffs (1075) concede this point and withdraw their § 1985 claim but not their § 1983 claim.

(2) PLAINTIFFS' ANTITRUST CLAIMS FAIL TO STATE A CAUSE OF ACTION

A. No Standing to Bring Suit and No "Antitrust Injury".

Defendants argue plaintiffs have no standing to bring an antitrust action because their injury (loss of control of real estate) is not a direct cognizable injury under the antitrust laws. The alleged injury is merely incidental to activities that are intended to be protected by the antitrust laws. Defendants cite *Central National Bank v. Rainbolt,* 720 F.2d 1183 (10th Cir. 1983) which held the ouster of a bank chairman resulting in the loss of bank ownership and control may have been an injury, but not one

with sufficient standing under the antitrust laws because the injury *was not the result of any lessening of competition.*

Defendants also argue that even assuming there was an injury, it is not the type of injury the antitrust laws were intended to forestall. Defendants are attempting to condemn plaintiffs land through legal means. If any injury has resulted, it is because of the condemnation and not because of any lessening of competition or any other antitrust violation. The same "injury" would occur even if there were no alleged "anticompetitive conspiracy" among defendants. If plaintiffs have been injured, it is only because "[c]ondemnation for urban renewal purposes is a constitutional limitation on the exercise of property rights," *Thornton v. Upah, supra,* at 1081, and not because of any antitrust violation.

Plaintiffs argue the results of defendants' actions – elimination of competition among buyers and developers in the real estate market in a three block area of downtown Denver – has injured plaintiffs. Before defendants executed their scheme, there was competition among buyers of plaintiffs' property and competition among developers to develop such properties. Now, only DURA is a potential buyer, and BCED a potential developer.

It will be extremely difficult for plaintiffs to prove a conspiracy existed and that the three block area in downtown Denver is the "relevant market" for purposes of assessing whether the defendants constitute a monopoly. Notwithstanding these observations, the claim should not be dismissed for a lack of standing. Defendants have attempted, unsuccessfully, to construct a semantic difference between "condemnation of a certain property" and

"elimination of competition to purchase a certain property", which, for antitrust purposes, is meaningless.

If plaintiffs can prove a conspiracy among defendants to monopolize and that the condemnation action was part of the monopolization scheme, then a definite antitrust injury would have occurred. There are a vast number a [sic] means by which to eliminate competition aside from price-fixing. The key is the effect the alleged action has on competition, not the means sought to lessen it. Plaintiffs antitrust claims may fail for other reasons but should not fail for a lack of standing.

That the "same injury" would occur even if defendants did not conspire and merely pursued an urban renewal plan in good faith is not relevant because the antitrust laws are invoked to forestall certain behavior. For example, every day businesses are "injured" by market activity, government decisions, and general economic policy decisions. Standing, however, to sue for such injuries can only be invoked when such injuries are the result of a violation of the antitrust laws. Conspiracy to monopolize a real estate market is just such a violation.

B. The *Parker* Doctrine.

Defendants argue that *Parker v. Brown*, 317 U.S. 341, 351-352, 63 S. Ct. 307, 313-14, 87 L. Ed. 315 (1943) held that state endorsed activities are immune from federal antitrust scrutiny even if anticompetitive. Also, *Town of Halle v. City of Eau Claire*, 471 U.S. 34, 105 S. Ct. 1713, 1719, 85 L. Ed.2d 24 (1985) held a municipality's anticompetitive activities that are authorized by a "clearly articulated and affirmatively expressed" state policy, are

immune from antitrust actions. This includes private developers who act in concert and pursuant to the municipality's plan. *Cine 42nd Street Theater Group Corp. v. Nedelander Organization, Inc.*, 790 F.2d 1032 (2nd Cir. 1986) (confers immunity on private third parties acting in concert with a municipality).

Plaintiffs assert the *Parker* doctrine does not apply to the facts of this case because plaintiffs are alleging *more* than the legitimate exercise of state urban renewal laws. They are alleging an *abuse* of those laws. The allegations of this abuse are the adoption of a "sham" redevelopment plan, the failure to follow mandated competitive bidding requirements, and a conspiracy between a private developer and city officials and the City of Denver deliberately to misuse the state urban renewal laws in order to injure competition. Specifically, defendants conspired to have plaintiffs' property designated as a blighted area, although the property is neither blighted nor a slum area, so that a predetermined developer could acquire, through eminent domain, property which the developer had not been able to acquire through negotiation.

Given these allegations, defendants' motion with respect to this argument is denied. A state agency's action is reviewable if the state legislation authorizing the state action did not contemplate use of that authorization to promote city or state officials' own interest and personal economic benefit. *City of Lafayette v. Louisiana Light & Power Co.*, 435 U.S. 389, 98 S. Ct. 1123, 55 L. Ed.2d 364 (1978). In *Cedar-Riverside Associates v. United States*, 459 F. Supp. 1290 (D. Minn. 1978), the court found the plaintiff had a right to attempt to establish an evidentiary base for its allegations, and, citing *City of Lafayette, supra*, held that

activities outside the scope of the grant by the state are not immunized from antitrust liability. *Id.* at 1299.

The motion is denied.

C. The *Noerr-Pennington* Doctrine.

This argument is in answer to plaintiffs' allegation that defendants' actions were a "mere sham". Defendants argue the *Noerr-Pennington* doctrine states concerted activities aimed at influencing state action (such as supporting an urban renewal project) cannot violate the Sherman Act lest defendants' First Amendment rights be abridged and the Sherman Act's purposes be expanded improperly. *Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135, 81 S. Ct. 523, 528, 5 L. Ed.2d 464 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657, 669, 85 S. Ct. 1585, 1592, 14 L. Ed.2d 626 (1965).

Since such "speech" is protected, defendants' "interaction" does not violate any antitrust laws, absent allegations of bribery, perjury, or the like, which are not present in this case. *Miracle Mile Associates v. City of Rochester*, 1979-2 Trade Cases, Para. 62,735, at 78,146 (W.D.N.Y. May 18, 1979) *aff'd* 617 F.2d 18 (2nd Cir. 1980).

The DURA defendants also argue plaintiffs' claims should be dismissed because an antitrust claim based upon alleged antitrust violations set forth in a conclusive manner which do not allege the antitrust violations of a defendant should be dismissed. *Shatkin v. General Electric*, 171 F.2d 236 (10th Cir. 1948). DURA also argues that the Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36 exempts local governments and their officers

and employees from any treble damages available under §§ 4, 4A or 4C of the Clayton Act.

Plaintiffs argue, similar to the arguments against the *Parker* doctrine, the *Noerr-Pennington* doctrine is inapplicable because defendants were engaging in something more than legitimate First Amendment speech to affect a state policy.

Just as the *Noerr-Pennington* doctrine would not immunize a defendant government official and private citizen from allegations of bribery or engaging in an illegal conspiracy, neither does it protect these defendants from these allegations of an antitrust conspiracy with private developers.

The statute is clear on treble damages, thus the government defendants should only be subject to compensatory damages.

(3) PLAINTIFFS' CLAIMS ARE NOT RIPE FOR ADJUDICATION

A. Civil Rights Claims Not Ripe.

Defendants argue plaintiffs have not yet suffered an injury of any kind, and even if there had been an injury it has not yet been "completed". In *United States v. 1,606.00 Acres of Land*, 698 F.2d 402, 407 (10th Cir. 1983) the Tenth Circuit held the "[p]ossible future taking of property cannot give rise to a present action for damages . . . Moreover, a threat to condemn one's property does not constitute a taking." Also precondemnation activity does not constitute a taking, *Danforth v. United States*, 308 U.S. 271, 281, 60 S. Ct. 231, 235, 84 L. Ed.240 ("mere

fluctuations in value during the process of governmental decision making are incidents of ownership which cannot be considered a taking in the constitutional sense").

Also, even if a "taking" has occurred, plaintiffs' action is not yet ripe because they have failed to make an application for just compensation. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108, 3121, 3124, 87 L. Ed.2d 126 (1985) ("the state action is not complete until it fails to provide adequate compensation for the taking. [It is] therefore require[d] that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action").

For the same reasons, substantive due process and procedural due process have not been violated since the plaintiffs have an adequate state law remedy.

Plaintiffs repeat their argument that they are *not* asserting their property has been taken without the payment of just compensation. As a result, a condemnation proceeding will not provide adequate relief. Further, there is a *present* injury as a proximate result of defendants' conduct, irrespective of the fact that a condemnation proceeding has not yet been instituted.

My statements in *Upah* concerning ripeness of these claims, are applicable to this action. Accordingly, defendants' motion with regard to this argument is denied:

> Defendants are correct that plaintiff's land has not been condemned. However, their argument that plaintiff's claims are not ripe because the land has not been condemned is without merit. Defendants' equation of a taking with a

> condemnation ignores cases which have, for example, stated that unreasonable government regulation may constitute a taking in some instances. [citations omitted]. Plaintiff has alleged such unreasonable government regulation in this case. Additionally, defendants have neglected plaintiff's claims for due process violations which have already occurred. I am well aware that "[c]laims based merely upon 'assumed potential invasions' of rights are not enough to warrant judicial intervention". [citations omitted]. In the present case, however, plaintiff's allegations do not rest on the outcome of the condemnation action. Rather, plaintiff has asserted claims based on actions which defendants have allegedly already taken and which purportedly violate plaintiff's rights. Accordingly, defendants' motion to dismiss for lack of jurisdiction, on the ground that plaintiff's claims are not ripe, is denied.

Id., at 1281.

Memphis Community School District v. Stachura, ___ U.S. ___, 106 S. Ct. 2537, 91 L. Ed.2d 249 (U.S., 1986) does not overrule this language as the municipal defendants argue.

B. Antitrust Clams not Ripe.

Defendants argue the antitrust claims are also not ripe because they have not, as of yet, suffered any "antitrust injury".

The municipal defendants argue this court has no subject matter jurisdiction until all of these claims become ripe, i.e. *after* compensation proceedings in eminent

domain, and after inverse condemnation proceeding pursuant to § 31-25-105, 12 C.R.S. (1977 Repl. Vol.); § 24-56-116, 10 C.R.S. (1982 Repl. Vol.).

For the reasons stated above in *Upah*, these claims are ripe.

(4) INJUNCTIVE RELIEF IS NOT APPROPRIATE BECAUSE PLAINTIFFS HAVE AN ADEQUATE REMEDY AT LAW

Finally, defendants argue plaintiffs' claims must fail because they have an adequate remedy at law – a state law condemnation proceeding. Defendants assert injunctive relief is not available in a condemnation proceeding because there is an adequate remedy at law. *Colorado Central Power Company v. City of Englewood*, 89 F.2d 233, 235 (10th Cir. 1937).

This relates back to the issue of whether there is an adequate remedy at state law. As plaintiffs stated earlier, the relief sought is to remove the unlawful burden placed upon plaintiffs' property by defendants' fraudulent actions. If Plaintiff is relegated to an action to recover just compensation, the fraudulent plan of defendants will have been successful.

Also, they argue the Supreme Court in *Bell v. Hood*, 327 U.S. 678, 683, 684, 66 S. Ct. 773, 776, 90 L. Ed. 939 (1946) reaffirmed the power of federal courts "to issue injunctions to protect rights safeguarded by the Constitution and to restrain individual state officers from doing what the Fourteenth Amendment forbids the state to do." *Id.* at 684, 66 S. Ct. at 777.

The statute allows not only for "an action at law" but also a "suit in equity, or other proper proceedings for redress". The motion to deny injunctive relief is denied.

ABSTENTION

There is a suggestion made by the municipal defendants that I exercise discretion to abstain by either: (1) dismissing the action without prejudice to plaintiffs' right to refile after they have completed their state remedies, or by (2) holding this action in abeyance and staying the exercise of jurisdiction pending the outcome of state action. *Pearl Investment Company v. City and County of San Francisco,* 774 F.2d 1460 (9th Cir. 1985).

The Block 173 Associates plaintiffs (1445) request that if I grant abstention, I do it by way of a stay and not by dismissal, in order to maintain control over the litigation.

The Oberndorf plaintiffs (1075) argue plaintiffs' civil rights claims involve unambiguous state constitutional issues and therefore abstention is not warranted. *Davis v. Mann,* 377 U.S. 678, 684, 84 S. Ct. 1441, 1444, 12 L. Ed.2d 609 (1964) ("where a federal court's jurisdiction is properly invoked, and the relevant state constitutional provision is plain and unambiguous, there is no need for a federal court to abstain.") Also, the antitrust claims involve no state constitutional issues.

The BCED defendants argue that abstention is not needed in this case.

There is no compelling need for me to declare abstention. The motion is denied.

ORDER ON MOTION FOR RECONSIDERATION

I.

INTRODUCTION

This is an action for injunctive and declaratory relief and damages. Plaintiffs argue a proposed urban renewal plan, approved by the city, interferes with their property rights and constitutes a regulatory taking in violation of the due process clause and equal protection clause of the Fourteenth Amendment. Plaintiffs also argue the plan violates the antitrust laws of the United States. In support thereof, plaintiffs allege that pursuant to an illegal conspiracy, the urban renewal plan fraudulently misrepresents their property, and the surrounding area to be redeveloped, as "blighted." As a result, the plan calls for the condemnation of plaintiffs' property to the benefit of defendant developer, BCED.

II.

BACKGROUND

On October 29, 1986, I issued a memorandum opinion and order in which I denied defendants' motions to dismiss for four separate reasors.

First, I held plaintiffs state civil rights claims upon which relief can be granted. Accordingly, I determined plaintiffs are *not* seeking just compensation for a legitimate government taking. Instead, they seek invalidation and money damages for the alleged illegitimate, illegal, and unconstitutional conspiratorial actions taken under the guise of a routine taking and condemnation proceeding. 42 U.S.C. § 1983 provides a remedy for such constitutional violations.

Second, I ruled plaintiffs' antitrust claims sufficiently state a cause of action because they allege an actual antitrust injury, not a mere "but for" causality link between legitimate government action and plaintiffs' injury. Further, I concluded defendants are not immunized from antitrust claims under the *Parker* doctrine (which allows an "antitrust injury" *if* such injury is cause by legitimate and legislatively envisioned agency regulation); nor the *Noerr-Pennington* doctrine (which allows citizens to engage in comment on issues of public action such as an urban renewal plan even if those citizens benefit from such action). With respect to the *Parker* doctrine, plaintiffs allege *more* than a mere anti-competitive injury caused by the legitimate use of the state urban renewal laws; they allege an antitrust conspiracy and an unconstitutional taking of their property, not a constitutional taking for which just compensation must be paid. With respect to the *Noerr-Pennington* doctrine, plaintiffs allege defendants' actions constitute an illegal conspiracy and as such those actions are not protected by the First Amendment. Thus, defendants' alleged actions fall outside the ambit of legitimate and protected government activities and are protected neither by the *Parker* nor the *Noerr-Pennington* doctrines.

Third, I concluded both the civil rights claims and the antitrust claims are ripe for adjudication because, if plaintiffs' allegations are true, there are *present* injuries which plaintiffs suffer.

Finally, I decided injunctive relief is appropriate because plaintiffs, in effect, have no adequate state remedy for defendants' alleged fraudulent actions. I also held

abstention was not necessary given the facts of this case and the status of the state court proceedings.

On November 14, 1986, defendant Denver Urban Renewal Authority submitted a motion for reconsideration of my memorandum opinion and order. Plaintiffs filed two separate briefs in response to DURA's motion for reconsideration, one by the Cook plaintiffs, and the other by the Block 173 plaintiffs and the Oberndorf plaintiffs.

III.

DURA'S MOTION FOR RECONSIDERATION

DURA asserts I erred in ruling plaintiffs' civil rights claims state claims upon which relief can be granted. The purported error is the failure to distinguish between the Colorado Constitution and the United States Constitution. Unlike the United States Constitution, DURA says the Colorado Constitution, Article II, Section 15, provides that a property owner whose property is *damaged* (not just "taken") for public or private use *must be compensated*.

> Private property shall not be taken *or damaged*, for public or private use, without just compensation. (emphasis added).

Constitution of Colorado, Article II, Section 15.

Accordingly, DURA argues this passage of the Colorado Constitution provides an owner with a claim for damages where the owner's property was not "taken", but only *damaged*. Thus, an owner may retain title to property and still obtain monetary damages caused by public use. DURA completes the loop by stating: in the instant case, there has not been a denial of any due process, since Colorado law provides for the payment of

compensation for the type of damages plaintiffs allege in their 42 U.S.C. § 1983 claims.[1]

The two state remedies available, according to DURA, are either an inverse condemnation action or an action to declare the regulation unconstitutional. Since plaintiffs have not pursued these avenues of relief, DURA asserts plaintiffs' claims under § 1983 are not ripe for adjudication. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed.2d 126 (1985) (If a state provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the just compensation clause until it has used the procedure and been denied just compensation). Plaintiffs respond that DURA misapprehends the nature of their claims because these kinds of allegations remove the instant case from the category to which DURA is referring, thus rendering inverse condemnation proceedings and a declaratory judgment with monetary damages inappropriate and inapplicable as remedies.

I agree. This case does not turn on whether defendants' actions amounted to a "taking" as opposed to a "damaging" of plaintiffs' property such that, in either

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[1] Plaintiffs are quick to point out, however, that these remedies are not for the type of damages they allege in the 42 U.S.C. § 1983 claims. In fact, this is the crux of the legal dispute because the type of injury alleged is not of the same type of injury the state framers contemplated when they wrote "taken or damaged" in the Colorado Constitution. DURA's suggested interpretation of Article II, Section 15 is somewhat fanciful and clearly beyond its obvious intent.

event, just compensation is the appropriate remedy. Instead, this case turns on whether just compensation via inverse condemnation proceedings or a declaratory judgment with monetary damages (which amounts to the same thing) are appropriate remedies when government agency action is not executed pursuant to a legitimate, statutorily-envisioned, state regulation, but is instead executed pursuant to an illegal conspiratorial action designed to violate a property owner's constitutional rights. Given the allegations in the instant case, there is no remedy under state law for plaintiffs to pursue in order for their civil rights claims to "ripen". The alleged conspiracy between BCED, DURA, and Denver has already taken place and the urban renewal plan has already been passed. It is an exercise in *ipse dixit* to say that the plan, itself, states a governmental purpose and is therefore legitimate.

IV.

CONCLUSIONS OF LAW

A. *The Nature of Plaintiffs' Civil Rights Claims.*

Defendants state in *Board of County Commissioners of Logan County v. Alder*, 69 Colo. 290, 194 P. 621 (1920), the Colorado Supreme Court ruled there could be a damage *without a taking*, or confiscation of property, under Article II, Section 15 of the Colorado Constitution. The court affirmed the award of property damages to the property owner against the county which constructed a bridge and an embankment resulting in some flooding on the owner's property. The court held Article II, Section 15, is applicable to damages resulting from the making of an

improvement even though the land was not condemned by the county in eminent domain proceedings.

Defendants cite similar Colorado cases to support their argument: *Dandrea v. Board of County Commissioners*, 144 Colo. 343, 356 P.2d 893 (1960) (recovery for damage to property caused by change in grade of road adjacent to plaintiffs' land); *SRB v. Board of County Commissioners of Larimer County*, 43 Colo. App. 14, 601 P.2d 1082 (1979) (plaintiffs' property damaged though the land itself was not appropriated); *Gidley v. City of Colorado Springs*, 160 Colo. 482, 418 P.2d 291 (1966) (property owned entitled to the damages to his property resulting from the change of grade of the street on which his property abutted); *Copley [sic, Collopy] v. Wildlife Commission*, 625 P.2d 994 (Colo. 1981) (plaintiff sought monetary damages for the destruction of crops by wildlife and Wildlife Commission regulations).

All of these cases, however, are immediately distinguishable because each case involves some *physical* invasion or destruction of real property or an appurtenant right. More importantly, the only complaints made by the property owners in these cases were for just compensation because the government activity, *pursuant to its legitimate and statutorily envisioned purpose*, constituted a taking or "damaging" of their properties. Under such circumstances, an inverse condemnation proceeding in which just compensation can be obtained is entirely appropriate. If the government action were an action pursuant to a legitimate, legal, statutorily envisioned public policy, then just compensation for the taking of, *or damages* to, plaintiffs' properties would be appropriate.

In the instant case, however, the actions of defendant are alleged to be illegal and fraudulent violations of plaintiffs' constitutional rights such that restricting plaintiffs to a suit for just compensation would not provide an adequate remedy. The critical difference is that plaintiffs allege illegitimate conspiratorial action *outside the ambit of the public policy contemplated by the legislative branch when it enacted statutes regarding condemnation.*

In *Gidley, supra, and Hermanson v. Board of County Commissioners,* 42 Colo. App. 154, 595 P.2d 694 (1979) (inverse condemnation allowed for a regulatory taking), the plaintiffs sought relief in the form of just compensation for taking and damaging of their property. Although there were contentions in both cases that a governmental entity had acted "unreasonably" and "unlawfully", the *sole relief requested* was just compensation for governmental activities deemed to be confiscatory by the plaintiffs.

The instant case, quite differently, involves allegations which exceed mere "questionable" condemnation proceedings, or a physical invasion "damaging" plaintiffs' real property. Again, plaintiffs are not requesting just compensation, instead they allege unconstitutional, illegal, and fraudulent actions taken in bad faith under color of state law. Just compensation is not the correct remedy for such violations. Thus, relegating plaintiffs to a claim for just compensation would not provide a meaningful remedy.

B. *Just Compensation: Money Damages and Inverse Condemnation Proceedings.*

Plaintiffs assert Colorado courts have held money damages are not an available remedy for a *"regulatory"*

taking, such as the instant case.[2] *In Gold Run, Ltd. v. Board of County Commissioners*, 38 Colo. App. 44, 554 P.2d 317 (1976), the Colorado Court of Appeals rejected the argument that money damages could be recovered for a regulatory decision that amounted to a taking, pointing out that invalidation, not inverse condemnation, is the appropriate remedy.

> Only when zoning is confiscatory does it rise to a "taking" and then the proper remedy is either to seek by declaratory judgment to invalidate the general zoning ordinance, *See Cherry Hills Village v. Trans-Roble Corp.*, 181 Colo. 356, 509 P.2d 797, or to challenge the particular rezoning authority through certiorari review pursuant to C.R.C.P. 106(a)(4). *Snyder v. Lakewood, Colorado*, [189 Colo. 421] 542 P.2d 371. By establishing that certiorari relief is the exclusive remedy for allegedly invalid zoning, as is challenged here, *Snyder* has precluded utilization of inverse condemnation.

554 P.2d at 319.

Therefore, in Colorado where a regulatory taking is alleged, the only available remedy is invalidation, not just compensation or "damages" under Article II, Section 15.

Plaintiffs argue any action based on Article II, Section 15, is a condemnation, or inverse condemnation action,

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[2] The passage of the declaration of blight and the adoption of the urban renewal plan are regulatory measures affecting the use and value of plaintiffs' property. Plaintiffs are still seeking monetary damages for antitrust violations. Their position is that money damages are not available for an illegitimate regulatory taking pursuant to an inverse condemnation proceeding for just compensation such as the one alleged in the instant case.

by its very nature. Such actions are tried as condemnations and provide the property owner with just compensation, not damages. *Ossman v. Mountain States Tel. & Tel., Co.*, 184 Colo. 360, 520 P.2d 738 (1974). As I have already determined, just compensation is not the proper remedy given plaintiffs' allegations. A declaratory judgment action with a claim for damages is nothing more than an inverse condemnation action for just compensation.

V. CONCLUSION

Defendants' reliance on Article II, Section 15, of the Colorado Constitution does not thwart plaintiffs' cause of action for the type of allegations they make. If it were otherwise, defendant municipalities could simply "assume away" all allegations of conspiratorial illegalities. Consequently, the egregiousness of their illegal conspiratorial actions could be reduced from § 1983 claim for damages to routine compensation determinations.

A "taking" or "damaging" of property is, by definition, constitutionally acceptable if just compensation is paid. Thus, a § 1983 action would be inappropriate because there is no constitutional violation. However, when constitutional rights are violated pursuant to an illegal conspiracy condemnation is no longer the exclusive remedy. The proper remedy for *constitutional violations* is a § 1983 civil rights action.

Plaintiffs' allegations must be kept in mind. BCED sought to develop a large area of downtown Denver but could not pursuade plaintiffs to sell their property. BCED complained to the City and County of Denver and to DURA that the project could never come to fruition

unless the plaintiffs' property could be acquired. Pursuant to a trilateral conspiracy, Denver created a "sham plan" to acquire the land through condemnation proceedings and by declaring plaintiffs' property as a "slum, blighted" area. Such favoritism to BCED and the means by which DURA and the City formulated the urban renewal plan violated plaintiffs' constitutional guarantees. At this point the § 1983 claims attach and the just compensation remedy becomes inappropriate.

It is ORDERED that defendants' motion for reconsideration is denied.

APPENDIX E

[FEDERAL STATUTES INVOLVED IN THE CASE]

15 U.S.C. § 1

§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every

person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

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15 U.S.C. § 2

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708.)

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42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.

APPENDIX F

[COLORADO REVISED STATUTES INVOLVED IN THE CASE]

31-25-102. Legislative declaration. (1) The general assembly finds and declares that there exist in municipalities of this state slum and blighted areas which constitute a serious and growing menace, injurious to the public health, safety, morals, and welfare of the residents of the state in general and of the municipalities thereof; that the existence of such areas contributes substantially to the spread of disease and crime, constitutes an economic and social liability, substantially impairs or arrests the sound growth of municipalities, retards the provision of housing accommodations, aggravates traffic problems and impairs or arrests the elimination of traffic hazards and the improvement of traffic facilities; and that the prevention and elimination of slums and blight is a matter of public policy and statewide concern in order that the state and its municipalities shall not continue to be endangered by areas which are focal centers of disease, promote juvenile delinquency, and consume an excessive proportion of its revenues because of the extra services required for police, fire, accident, hospitalization, and other forms of public protection, services, and facilities.

(2) The general assembly further finds and declares that certain slum or blighted areas, or portions thereof, may require acquisition, clearance, and disposition subject to use restrictions, as provided in this part 1, since the prevailing conditions therein may make impracticable the reclamation of the area by conservation or rehabilitation; that other slum or blighted areas, or portions thereof,

through the means provided in this part 1, may be susceptible of conservation or rehabilitation in such a manner that the conditions and evils enumerated in this section may be eliminated, remedied, or prevented; and that salvable slum and blighted areas can be conserved and rehabilitated through appropriate public action, as authorized or contemplated in this part 1, and the cooperation and voluntary action of the owners and tenants of property in such areas.

(3) The general assembly further finds and declares that the powers conferred by this part 1 are for public uses and purposes for which public money may be expended and the police power exercised and that the necessity in the public interest for the provisions enacted in this part 1 is declared as a matter of legislative determination.

31-25-103. Definitions. As used in this part 1, unless the context otherwise requires:

(1) "Authority" or "urban renewal authority" means a corporate body organized pursuant to the provisions of this part 1 for the purposes, with the powers, and subject to the restrictions set forth in this part 1.

(2) "Blighted area" means an area which, by reason of the presence of a substantial number of slum, deteriorated, or deteriorating structures, predominance of defective or inadequate street layout, faulty lot layout in relation to size, adequacy, accessibility, or usefulness, unsanitary or unsafe conditions, deterioration of site or

other improvements, unusual topography, defective or unusual conditions of title rendering the title nonmarketable, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors, substantially impairs or arrests the sound growth of the municipality, retards the provision of housing accommodations or constitutes an economic or social liability, and is a menace to the public health, safety, morals, or welfare in its present condition and use.

(3) "Bonds" means any bonds (including refunding bonds), notes, interim certificates or receipts, temporary bonds, certificates of indebtedness, debentures, or other obligations.

(4) "Obligee" means any bondholder, agent, or trustee for any bondholder, or any lessor demising to an authority property used in connection with an urban renewal project of the authority, or any assignee of such lessor's interest or any part thereof, and the federal government when it is a party to any contract or agreement with the authority.

(5) "Public body" means the state of Colorado or any municipality, quasi-municipal corporation, board, commission, authority, or other political subdivision or public corporate body of the state.

(6) "Real property" means lands, lands under water, structures, and any and all easements, franchises, incorporeal hereditaments, and every estate and right therein, legal and equitable, including terms for years and liens by way of judgment, mortgage, or otherwise.

(7) "Slum area" means an area in which there is a predominance of buildings or improvements, whether residential or nonresidential, and which, by reason of dilapidation, deterioration, age or obsolescence, inadequate provision for ventilation, light, air, sanitation, or open spaces, high density of population and overcrowding, or the existence of conditions which endanger life or property by fire or other causes, or any combination of such factors, is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency, or crime and is detrimental to the public health, safety, morals, or welfare.

(8) "Urban renewal area" means a slum area, or a blighted area, or a combination thereof which the local governing body designates as appropriate for an urban renewal project.

(9) "Urban renewal plan" means a plan, as it exists from time to time, for an urban renewal project, which plan conforms to a general or master plan for the physical development of the municipality as a whole and which is sufficiently complete to indicate such land acquisition, demolition and removal of structures, redevelopment, improvements, and rehabilitation as may be proposed to be carried out in the urban renewal area, zoning and planning changes, if any, land uses, maximum densities, building requirements, and the plan's relationship to definite local objectives respecting appropriate land uses, improved traffic, public transportation, public utilities, recreational and community facilities, and other public improvements.

(10) "Urban renewal project" means undertakings and activities in an urban renewal area for the elimination and for the prevention of the development or spread of slums and blight and may involve slum clearance and redevelopment, or rehabilitation, or conservation, or any combination or part thereof, in accordance with an urban renewal plan. Such undertakings and activities may include:

(a) Acquisition of a slum area or a blighted area or portion thereof;

(b) Demolition and removal of buildings and improvements;

(c) Installation, construction, or reconstruction of streets, utilities, parks, playgrounds, and other improvements necessary for carrying out the objectives of this part 1 in accordance with the urban renewal plan;

(d) Disposition of any property acquired or held by the authority as a part of its undertaking of the urban renewal project for the urban renewal areas (including sale, initial leasing, or temporary retention by the authority itself) at the fair value of such property for uses in accordance with the urban renewal plan;

(e) Carrying out plans for a program through voluntary action and the regulatory process for the repair, alteration, and rehabilitation of buildings or other improvements in accordance with the urban renewal plan; and

(f) Acquisition of any other property where necessary to eliminate unhealthful, unsanitary, or unsafe conditions, lessen density, eliminate obsolete or other uses

detrimental to the public welfare, or otherwise remove or prevent the spread of blight or deterioration or to provide land for needed public facilities.

31-25-105. Powers of an authority. (1) Every authority has all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this part 1, including, but not limited to, the following powers in addition to others granted in this part 1:

(a) To sue and to be sued; to adopt and have a seal and to alter the same at pleasure; to have perpetual succession; to make, and from time to time amend and repeal, bylaws, orders, rules, and regulations to effectuate the provisions of this part 1;

(b) To undertake urban renewal projects and to make and execute any and all contracts and other instruments which it may deem necessary or convenient to the exercise of its powers under this part 1, including, but not limited to, contracts for advances, loans, grants, and contributions from the federal government or any other source;

(c) To arrange for the furnishing or repair by any person or public body of services, privileges, works, streets, roads, public utilities, or educational or other facilities for or in connection with a project of the authority; to dedicate property acquired or held by it for public works, improvements, facilities, utilities, and purposes; and to agree, in connection with any of its contracts, to any conditions that it deems reasonable and appropriate

under this part 1, including, but not limited to, conditions attached to federal financial assistance, and to include in any contract made or let in connection with any project of the authority provisions to fulfill such of said conditions as it may deem reasonable and appropriate;

(d) To arrange with the municipality or other public body to plan, replan, zone, or rezone any part of the area of the municipality or of such other public body, as the case may be, in connection with any project proposed or being undertaken by the authority under this part 1;

(e) To enter, with the consent of the owner, upon any building or property in order to make surveys or appraisals and to obtain an order for this purpose from a court of competent jurisdiction in the event entry is denied or resisted; to acquire any property by purchase, lease, option, gift, grant, bequest, devise, or otherwise to acquire any interest in property by condemnation, including a fee simple absolute title thereto, in the manner provided by the laws of this state for the exercise of the power of eminent domain by any other public body (and property already devoted to a public use may be acquired in a like manner except that no property belonging to the federal government or to a public body may be acquired without its consent); to hold, improve, clear, or prepare for redevelopment any such property; to mortgage, pledge, hypothecate, or otherwise encumber or dispose of its property; and to insure or provide for the insurance of any property or operations of the authority against any risks or hazards; except that no provision of any other law with respect to the planning or undertaking of projects or the acquisition, clearance, or disposition of property by public bodies shall restrict an authority exercising

powers under this part 1, in the exercise of such functions with respect to a project of such authority unless the general assembly specifically so states;

(f) (I) To invest any of its funds not required for immediate disbursement in property or securities in which public bodies may legally invest funds subject to their control and to redeem such bonds as it has issued at the redemption price established therein or to purchase such bonds at less than redemption price, all such bonds so redeemed or purchased to be cancelled;

(II) To deposit any funds not required for immediate disbursement in any depository authorized in section 24-75-603, C.R.S. For the purpose of making such deposits, the authority may appoint, by written resolution, one or more persons to act as custodians of the funds of the authority. Such persons shall give surety bonds in such amounts and form and for such purposes as the authority requires.

(g) To borrow money and to apply for and accept advances, loans, grants, and contributions from the federal government or other source for any of the purposes of this part 1 and to give such security as may be required;

(h) To make such appropriations and expenditures of its funds and to set up, establish, and maintain such general, separate, or special funds and bank accounts or other accounts as it deems necessary to carry out the purposes of this part 1;

(i) To make or have made and to submit or resubmit to the governing body for appropriate action the authority's proposed plans and modifications thereof necessary

to the carrying out of the purposes of this part 1, such plan shall include, but not be limited to:

(I) Plans to assist the municipality in the latter's preparation of a workable program for utilizing appropriate private and public resources to eliminate and prevent the development or spread of slum and blighted areas, to encourage needed urban rehabilitation, to provide for the redevelopment of slum and blighted areas, or to undertake such activities or other feasible municipal activities as may be suitably employed to achieve the objectives of such workable program, which program may include, without limitation, provisions for: The prevention of the spread of blight into areas of the municipality which are free from blight through diligent enforcement of housing, zoning, and occupancy controls and standards; the rehabilitation or conservation of slum and blighted areas or portions thereof by replanning, removing congestion, providing public improvements, and encouraging rehabilitation and repair of deteriorated or deteriorating structures; and the clearance and redevelopment of slum and blighted areas or portions thereof;

(II) Urban renewal plans;

(III) Preliminary plans outlining proposed urban renewal activities for neighborhoods of the municipality to embrace two or more urban renewal areas;

(IV) Plans for the relocation of those individuals, families, and business concerns situated in the urban renewal area which will be displaced by the urban renewal project, which relocation plans, without limitation, may include appropriate data setting forth a feasible method

for the temporary relocation of such individuals and families and showing that there will be provided, in the urban renewal area or in other areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the individuals and families so displaced, decent, safe, and sanitary dwellings equal in number to the number of and available to such individuals and families and reasonably accessible to their places of employment;

(V) Plans for undertaking a program of voluntary repair and rehabilitation of buildings and improvements and for the enforcement of state and local laws, codes, and regulations relating to the use of land and the use and occupancy of buildings and improvements and to the repair, rehabilitation, demolition, or removal of buildings and improvements;

(VI) Financing plans, maps, plats, appraisals, title searches, surveys, studies, and other preliminary plans and work necessary or pertinent to any proposed plans or modifications;

(j) To make reasonable relocation payments to or with respect to individuals, families, and business concerns situated in an urban renewal area which will be displaced as provided in subparagraph (IV) of paragraph (i) of this subsection (1) for moving expenses and actual direct losses of property (except goodwill or profit) resulting from their displacement for which reimbursement or compensation is not otherwise made, including the making of such payments financed by the federal government;

(k) To develop, test, and report methods and techniques and to carry out demonstrations and other activities for the prevention and the elimination of slum and blighted areas within the municipality;

(l) To rent or to provide by any other means suitable quarters for the use of the authority or to accept the use of such quarters as may be furnished by the municipality or any other public body, and to equip such quarters with such furniture, furnishings, equipment, records, and supplies as the authority may deem necessary to enable it to exercise its powers under this part 1.

31-25-106. Disposal of property in urban renewal area. (1) An authority may sell, lease, or otherwise transfer real property or any interest therein acquired by it as a part of an urban renewal project for residential, recreational, commercial, industrial, or other uses or for public use in accordance with the urban renewal plan, subject to such covenants, conditions, and restrictions, including covenants running with the land (and including the incorporation by reference therein of the provisions of an urban renewal plan or any part thereof), as it deems to be in the public interest or necessary to carry out the purposes of this part 1. The purchasers, lessees, transferees, and their successors and assigns are obligated to devote such real property only to the land uses, designs, building requirements, timing, or procedure specified in the urban renewal plan and may be obligated to comply with such other requirements as the authority may determine to be in the public interest, including the obligation to

begin within a reasonable time any improvements on such real property required by the urban renewal plan. Such real property or interest shall be sold, leased, or otherwise transferred at not less than its fair value (as determined by the authority) for uses in accordance with the urban renewal plan. In determining the fair value of real property for uses in accordance with the urban renewal plan, an authority shall take into account and give consideration to the uses provided in such plan; the restrictions upon and the covenants, conditions, and obligations assumed by the purchaser or lessee; and the objectives of such plan for the prevention of the recurrence of slum or blighted areas. Real property acquired by an authority which, in accordance with the provisions of the urban renewal plan, is to be transferred shall be transferred as rapidly as feasible in the public interest consistent with the carrying out of the provisions of the urban renewal plan. Any contract for such transfer and the urban renewal plan (or such part of such contract or plan as the authority may determine) may be recorded in the land records of the county in such manner as to afford actual or constructive notice thereof.

(2) An authority may dispose of real property in an urban renewal area to private persons only under such reasonable competitive bidding procedures as it shall prescribe or as provided in this subsection (2). An authority, by public notice by publication once each week for two consecutive weeks in a newspaper having a general circulation in the municipality, prior to the execution of any contract to sell, lease, or otherwise transfer real property and prior to the delivery of any instrument of conveyance with respect thereto under the provisions of this

section, may invite proposals from and make available all pertinent information to any person interested in undertaking to redevelop or rehabilitate an urban renewal area or any part thereof. Such notice shall identify the area, or portion thereof, and shall state that such further information as is available may be obtained at the office designated in the notice. The authority shall consider all such redevelopment or rehabilitation proposals and the financial and legal ability of the persons making such proposals to carry them out and may negotiate with any persons for proposals for the purchase, lease, or other transfer of any real property acquired by the authority in the urban renewal area. The authority may accept such proposal as it deems to be in the public interest and in furtherance of the purposes of this part 1; except that a notification of intention to accept such proposal shall be filed with the governing body not less than fifteen days prior to any such acceptance. Thereafter, the authority may execute such contract in accordance with the provisions of subsection (1) of this section and deliver deeds, leases, and other instruments and take all steps necessary to effectuate such contract.

(3) An authority may temporarily operate and maintain real property acquired in an urban renewal area pending the disposition of the property for redevelopment without regard to the provisions of subsection (1) of this section for such uses and purposes as may be deemed desirable even though not in conformity with the urban renewal plan.

(4) Anything in subsection (1) of this section to the contrary notwithstanding, project real property may be set aside, dedicated, and devoted by the authority to

public uses which are in accordance with the urban renewal plan or set aside, dedicated, and transferred by the authority to the municipality or to any other appropriate public body for public uses which are in accordance with such urban renewal plan, with or without compensation for such property and with or without regard to the fair value thereof as determined in subsection (1) of this section, upon or subject to such terms, conditions, covenants, restrictions, or limitations as the authority deems to be in the public interest and as are not inconsistent with the purposes and objectives and the other applicable provisions of this part 1.

31-25-107. Approval of urban renewal plans by the local governing body. (1) An authority shall not actually undertake an urban renewal project for an urban renewal area unless the governing body, by resolution, has determined such area to be a slum, blighted area, or a combination thereof and designated such area as appropriate for an urban renewal project. The governing body shall not approve an urban renewal plan until a general plan for the municipality has been prepared. An authority shall not acquire real property for an urban renewal project unless the local governing body has approved the urban renewal plan in accordance with subsection (4) of this section.

(2) Prior to its approval of an urban renewal plan, the governing body shall submit such plan to the planning commission of the municipality, if any, for review

and recommendations as to its conformity with the general plan for the development of the municipality as a whole. The planning commission shall submit its written recommendations with respect to the proposed urban renewal plan to the governing body within thirty days after receipt of the plan for review. Upon receipt of the recommendations of the planning commission or, if no recommendations are received within said thirty days, without such recommendations, the governing body may proceed with the hearing on the proposed urban renewal plan prescribed by subsection (3) of this section.

(3) The governing body shall hold a public hearing on an urban renewal plan or substantial modification of an approved urban renewal plan after public notice thereof by publication in a newspaper having a general circulation in the municipality. The notice shall describe the time, date, place, and purpose of the hearing, shall generally identify the urban renewal area covered by the plan, and shall outline the general scope of the urban renewal project under consideration.

(4) Following such hearing, the governing body may approve an urban renewal plan if it finds that:

(a) A feasible method exists for the relocation of individuals and families who will be displaced by the urban renewal project in decent, safe, and sanitary dwelling accommodations within their means and without undue hardship to such individuals and families;

(b) The urban renewal plan conforms to the general plan of the municipality as a whole; and

(c) The urban renewal plan will afford maximum opportunity, consistent with the sound needs of the municipality as a whole, for the rehabilitation or redevelopment of the urban renewal area by private enterprise.

(5) In case the urban renewal area consists of an area of open land which, under the urban renewal plan, is to be developed for residential uses, the governing body shall comply with the applicable provisions of this section and shall also determine that a shortage of housing of sound standards and design which is decent, safe, and sanitary exists in the municipality; that the need for housing accommodations has been or will be increased as a result of the clearance of slums in other areas (including other portions of the urban renewal area); that the conditions of blight in the urban renewal area and the shortage of decent, safe, and sanitary housing cause or contribute to an increase in and spread of disease and crime and constitute a menace to the public health, safety, morals, or welfare; and that the acquisition of the area for residential uses is an integral part of and essential to the program of the municipality.

(6) In case the urban renewal area consists of an area of open land which, under the urban renewal plan, is to be developed for nonresidential uses, the local governing body shall comply with the applicable provisions of this section and shall also determine that such nonresidential uses are necessary and appropriate to facilitate the proper growth and development of the community in accordance with sound planning standards and local community objectives and that the contemplated acquisition of the area may require the exercise of governmental

action, as provided in this part 1, because of being in a blighted area.

(7) An urban renewal plan may be modified at any time; but, if modified after the lease or sale by the authority of real property in the urban renewal project area, such modification shall be subject to such rights at law or in equity as a lessee or purchaser or his successor in interest may be entitled to assert. Any proposed modification shall be submitted to the governing body for a resolution as to whether or not such modification will substantially change the urban renewal plan in land area, land use, design, building requirements, timing, or procedure, as previously approved, and, if it finds that there will be a substantial change, its approval of such modification shall be subject to the requirements of this section.

(8) Upon the approval by the governing body of an urban renewal plan or a substantial modification thereof, the provisions of said plan with respect to the land area, land use, design, building requirements, timing, or procedure applicable to the property covered by said plan shall be controlling with respect thereto.

* * *

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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Case No. 90-6

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

BLOCK 173 ASSOCIATES,

Petitioner,

v.

THE CITY AND COUNTY OF DENVER, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENTS' JOINT BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the actions of respondents the City and County of Denver, Mayor Federico Peña, the City Council of the City and County of Denver, the Denver Urban Renewal Authority, and BCE Development Properties Inc. in proposing an urban renewal plan, and the Denver City Council's adoption of an urban renewal plan are immune from the antitrust laws under *Parker v. Brown*, 317 U.S. 341 (1943), and its progeny?

II. Whether respondent BCE Development Properties Inc.'s petitioning of Denver officials to encourage adoption of the urban renewal plan is protected activity under the *Noerr-Pennington* doctrine?

III. Whether the urban renewal plan was rationally related to a legitimate public purpose and, therefore, under *Berman v. Parker*, 348 U.S. 26 (1954), and its progeny, did not violate petitioner's civil rights?

PARTIES

Respondent BCE Development Properties Inc. is now known as Brookfield Development Inc. The parent company of Brookfield Development Inc. is Brookfield Development Corporation, whose parent is BCE Development Corporation. Brookfield Development Inc. does not have any subsidiaries which are not wholly owned.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
I. STATEMENT OF THE FACTS	2
II. THE LITIGATION BELOW	7
A. Claims Asserted in the District Court and Summary Judgment	7
B. The Tenth Circuit's Decision	8
REASONS WHY THE WRIT SHOULD BE DENIED	9
I. THERE IS NO REASON FOR THIS COURT TO REVIEW THE TENTH CIRCUIT'S STATE ACTION IMMUNITY DECISION	9
A. This Petition is an Attempt to Continue Litigation over the Conclusions to be Drawn from Undisputed Evidence	10
B. The Tenth Circuit's Decision Does Not Create a Conflict Among the Circuits	12
II. THE TENTH CIRCUIT'S NOERR-PENNINGTON DECISION DOES NOT CONSTITUTE AN OPPORTUNITY FOR THIS COURT TO CONSIDER THE CO-CONSPIRATOR EXCEPTION	17
III. NO SUPREME COURT ISSUE WAS CREATED BY THE TENTH CIRCUIT'S DECISION ON PETITIONER'S CIVIL RIGHTS CLAIMS	18
CONCLUSION	20

TABLE OF AUTHORITIES

Cases	PAGE
Berman v. Parker, 348 U.S. 26 (1954)	18
Boone v. Redevelopment Agency of City of San Jose, 841 F.2d 886 (9th Cir. 1988) *cert. denied* 488 U.S. 965 (1988)	12, 13
Cine 42nd Street Theater Corp. v. Nederlander Organization Inc., 790 F.2d 1032 (2d Cir. 1986)	14
City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978)	9, 13, 17, 18
E.E.O.C. v. Federal Labor Relations Auth., 476 U.S. 19 (1986)	10
Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)	8
Omni Outdoor Advertising v. Columbia Outdoor Advertising, 891 F.2d 1127 (4th Cir. 1989), *cert. granted sub nom. Columbia Outdoor Advertising v. Omni Outdoor Advertising*, ____ U.S. ____, 110 S.Ct. 3211 (1990)	14-16
Parker v. Brown, 317 U.S. 341 (1943)	8
Patrick v. Burget, 486 U.S. 94, 108 S. Ct. 1658 (1988)	14
Scott v. City of Sioux City, Iowa, 736 F.2d 1207 (8th Cir. 1984) *cert. denied* 471 U.S. 1003 (1985)	13, 14, 16, 17
Snowden v. Hughes, 321 U.S. 1 (1944) . . .	19
Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985)	9, 12-15, 17
Westborough Mall v. City of Cape Girardeau, Mo., 693 F.2d 733 (8th Cir. 1982)	16

PAGE

Whitworth v. Perkins, 559 P.2d 378 (5th Cir. 1977), *vacated on other grounds*, 435 U.S. 992 (1978) *cert. denied* 440 U.S. 911 (1979) 16, 17

Statutes

C.R.S. § 31-25-103(2) 4

C.R.S. § 31-25-106(2) 6

C.R.S. §§ 31-25-107(1)-(3) 5

Other Authorities

Federal Rule of Civil Procedure 56 10

In The

Supreme Court of the United States

OCTOBER TERM, 1990

Case No. 90-6

BLOCK 173 ASSOCIATES,

Petitioner,

v.

THE CITY AND COUNTY OF DENVER, *et al.*,

Respondents

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENTS' JOINT BRIEF IN OPPOSITION

Respondents the City and County of Denver, Mayor Federico Penã, the City Council of the City and County of Denver, the Denver Urban Renewal Authority, and BCE Development Properties Inc. respectfully request that the Court deny the petition for writ of certiorari.

STATEMENT OF THE CASE

This petition is the outgrowth of a local land use controversy which the petitioner fought and lost in the political arena. The petitioner is a landowner who lobbied and testified against Denver's attempt to eliminate and prevent blight through the redevelopment and revitalization of part of its

downtown area.[1] Representatives of the respondents the City and County of Denver, the Mayor of Denver, the Denver City Council, the Denver Urban Renewal Authority ("DURA"), and BCE Development Properties Inc. ("BCED"), a private developer and landowner, and others participated in the preparation of an urban renewal plan (the "Plan") which was presented to and approved by the Denver City Council on May 27, 1986.[2]

I. STATEMENT OF THE FACTS

The City and County of Denver and its leaders have long been interested in revitalizing downtown Denver. Encouraging and stimulating the downtown retail trade is one important element of that goal. (Record, F. Penã dep. at 21-23; R. Fleming dep. at 60-62.) In the early 1980's, City officials and the Denver Partnership, Inc. ("DPI"), a nonprofit civic organization, began courting national retail developers and major department stores to persuade them to build retail projects and to open department stores in downtown Denver. (App. Pet. at 24a.) At the same time, the City and DPI urged downtown property owners, including BCED and others, to develop a major retail project. (App. Pet. at 25a.)

These City officials and DPI realized from the start that neither the national retail developers nor the local landowners could, on their own, afford to build large, multi-block retail projects because of the high cost of land, the lower

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[1] Donald Oberndorf, Leo Stern, Harry Paul Wertheimer, Carol Brodie, Trust Administrator for Edith O. Wertheimer Trust, and Dottie Hammel were plaintiffs and appellants with the petitioner in the lower courts. However, they did not join in this petition and, therefore, they are respondents for the purposes of this petition. Like the petitioner, they own land in downtown Denver and they opposed the Plan in the political arena, and, later, in the actions below. These respondents are sometimes collectively referred to as the "Oberndorf Group."

[2] The City and County of Denver, Mayor Federico Penã, and the City Council are sometimes collectively referred to as the "Municipal Defendants."

return for retail projects than for office towers, and the need to make substantial concessions to anchor department store tenants in order to lure them to downtown. (App. Pet. at 24a.) They concluded that any major downtown retail project, regardless of the identity of the developer, would require substantial public financial involvement. (*Id.*) Accordingly, the City officials decided that Denver would have to form a public/private partnership if multi-block retail projects were to be built in downtown Denver. (*Id.*)

Although the City and DPI contacted many potential developers who expressed varying degrees of interest, only BCED was sufficiently interested to commit significant time and resources towards meeting with City and DURA officials, potential underwriters, and others in order to develop a proposal. (App. Pet. at 25a.) Although plans varied, BCED was considering a two or three block project, which became known as the Centerstone Project. (App. Pet. at 25a.)

Although various forms of public financing were discussed, it became clear that tax increment financing, which dedicates incremental tax revenues within an urban renewal area to repayment of bonds, was the most feasible source of public funding. (App. Pet. at 25a.) Because the Colorado urban renewal statute permits the use of tax increment financing, the Municipal Defendants, DURA, BCED, and others began to discuss the outline of an urban renewal plan, including the proposed boundaries of the urban renewal area and aspects of public financing. (App. Pet. at 25a, 26a.)

Those working on the proposed plan recognized that the Denver City Council could adopt an urban renewal plan only if the City Council found that the area which is the subject of that plan was blighted. Accordingly, in December 1985, the Denver City Council adopted a resolution directing DURA to study whether statutory blight factors existed in a 15-block area of downtown Denver and to formulate a proposed urban renewal plan for the area. (Record, Resolution No. 85.) The

resolution made the public interest in redeveloping downtown quite clear: "[T]he redevelopment of downtown is critical to the economic strength of . . . Denver." (*Id.*)

In February 1986, after examining the bids of three independent consulting firms for a survey of blight conditions in the proposed 15-block area, DURA chose HOH Associates, Inc. ("HOH") for the task. (Record, HOH Contract; G. McFadyen dep. at 135-36, 138-39.) In March 1986, HOH completed its study of blight conditions and submitted its report to DURA. The study concluded that numerous statutory blight factors existed in the area. (App. Pet. at 26a.) *See generally* C.R.S. § 31-25-103(2) (defining "blighted area" for urban renewal purposes) (App. Pet. at 74a, 75a.)

In late March, DURA's Executive Director prepared a first draft of the Plan and submitted it to various representatives of the City, BCED, bond underwriters, and their counsel for comment and analysis. (Record, G. McFadyen dep. at 199-200.) For several weeks, that group revised and refined the proposed Plan. (App. Pet. at 26a.) During that period, the petitioner, the Oberndorf Group and several other downtown property owners actively lobbied City officials in an effort to block or modify the proposed Plan. (Record, R. Crider dep. at 200-201; D. Oberndorf dep. at 80-85, 122-23.) On May 15, 1986 at a public hearing, DURA's Board of Directors passed a resolution recommending approval by the City Council of the Plan. (Record, DURA Board Minutes.)

On May 27, 1986, the Denver City Council held a public hearing concerning the Plan. (Record, City Council hearing trans. at 1.) Public notice of the hearing was given, and the petitioner, the Oberndorf Group and other opponents appeared and made extensive presentations opposing the Plan. (*Id.* at 13-25.) In their presentations, they argued that there was no blight in the area and submitted written reports of several consultants whom they had hired. (*Id.* at 17-20.) Other people spoke at the hearing in support of the Plan and HOH's determination that blight existed. (*Id.* at 9-13.)

At the conclusion of the May 27, 1986 hearing, by a vote of 9-2, the City Council enacted Ordinance No. 309, which approved the Plan. (Record, Ordinance.) In so doing, the City Council made the legislative determination that blight existed in the 15-block area and that the Plan conformed to Denver's Comprehensive Plan. *See generally* C.R.S. §§ 31-25-107(1)-(3) (App. Pet. at 86a-87a.) (Record, Plan.) The City Council also found that the Plan would eliminate and prevent the spread of blight in the urban renewal area. (Record, Plan.)

In general terms, the Plan permits DURA to use tax increment financing bonds in order to promote the construction of "retail, commercial, and related support facilities" within the Plan area. (Record, Plan at 15-20.) Subject to approval by the City, such redevelopment projects are to be built by developers pursuant to "Redevelopment Agreements" between the private developer and DURA. (*Id.* at 2-3, 14-15.) There was no Redevelopment Agreement between DURA and any developer when the Plan was approved, and no particular developer is referred to in the Plan.

Under certain circumstances, property within the urban renewal area, including the petitioner's and BCED's, can be condemned. (*Id.* at 11-12.) The Plan does not provide for the transfer of any property acquired by DURA to any particular private developer but, instead, it provides for the disposition of such property "in accordance with the provisions" of the urban renewal law. (*Id.* at 13.) Although the Plan provides for an initial "Phase I" focus on three blocks, which include BCED's and the petitioner's property, it also contemplates redevelopment throughout the urban renewal area and the resulting "continued growth and development of the central business district of the City." (*Id.* at 7-8.)

As they consistently testified at their depositions, the public officials who participated in the planning process and supported the Plan did so because they thought it was in the public interest and because it would help prevent the further

decline of downtown Denver's retail businesses.[2] Mayor Penã, in his deposition, explained that he backed the Plan because it would "strengthen our retail base," "make sure that downtown continued to be strong and viable," and increase sales tax revenues to pay for needed public services. (Record, F. Penã dep. at 22-23.)

In August 1987, over a year after the Plan was approved and the lawsuits alleging a conspiracy were filed, DURA issued an Offering Prospectus and solicited proposals from prospective developers "for the redevelopment of all or a portion of a 15-block area in downtown Denver." (Record, DURA Offering Prospectus) (App. Pet. at 28a). *See generally* C.R.S. § 31-25-106(2) (App. Pet. at 84a-85a.) Four prospective redevelopers submitted proposals to DURA by the December 2, 1987 deadline. (Record, Summary of DURA Board Decision.) On February 4, 1988, DURA announced that it would engage in "exclusive negotiations" with BCED and another potential redeveloper concerning their proposals for redevelopment in the urban renewal area. (*Id.*) DURA selected BCED for this stage of the process because BCED's proposal was best suited to meet DURA's objectives:

> [The proposed project] meets the major objectives for the urban renewal plan and the Offering Prospectus of the Denver Urban Renewal Project . . . [and] will provide the strength to the south end of the 16th Street Mall that is needed to maintain a healthy downtown retail climate. (*Id.*)

Even before it concluded its negotiations with BCED, DURA signed a Redevelopment Agreement with Cambridge Development Group ("Cambridge"), on June 23, 1988, for a project inside the 15 block urban renewal area but not for the

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[2] The City Council members who voted for the Plan and who were deposed also testified that they acted because they thought the Plan was in the best interests of Denver. (Record, K. Reynolds dep. at 21; T. Hackworth dep. at 30, 114-15; S. Foote dep. at 96; C. Donohue dep. at 56-57; R. Crider dep. at 153.)

"Phase I" blocks. (Record, Aff. of S. Powers.) DURA entered into this Redevelopment Agreement with Cambridge even though Cambridge had not assisted DURA and the Municipal Defendants in formulating the Plan. It was not until July 14, 1988 that DURA signed a Redevelopment Agreement with BCED regarding the Centerstone Project. (Record, Aff. of S. Powers.)

II. THE LITIGATION BELOW.

A. Claims Asserted in the District Court and Summary Judgment.

Shortly after the Plan was approved in May 1986, the petitioner, the Oberndorf Group, and a third group of downtown landowners, who subsequently settled their claims, filed lawsuits in both state and federal court, challenging the validity of the Plan and the activities of the Municipal Defendants, DURA and BCED in formulating and advocating the Plan. In its federal lawsuit, the petitioner alleged that the Plan violated Sections 1 and 2 of the Sherman Act by eliminating competition for the development of property within the proposed urban renewal area. (App. Pet. at 28a) The petitioner also contended that its constitutionally protected property rights were interfered with by the regulatory taking of their property in violation of the equal protection and due process clauses. (*Id.*) According to the petitioner and the Oberndorf Group, both the antitrust and civil rights violations were the product of a conspiracy among the Municipal Defendants, DURA and BCED. (*Id.*)

After extensive discovery, the Municipal Defendants, DURA, and BCED filed summary judgment motions in July 1988, and the petitioner responded. In a 20 page order filed September 19, 1988, Judge Jim R. Carrigan granted the motion for summary judgment, dismissing all of the petitioner's and Oberndorf Group's claims with prejudice. (App. Pet. at 21a-41a.)

There were four basic grounds for his ruling. *First*, he reviewed the materials submitted with the briefs and, applying this Court's recently articulated standards for the consideration of summary judgment motions, held that the petitioner and the Oberndorf Group had not met their summary judgment burden of coming forward with sufficient undisputed evidence of the alleged conspiracy. (App. Pet. at 29a, 36a, 38a, 41a)

Second, Judge Carrigan held that the defendants' actions in formulating and advocating the Plan, and the City Council's subsequent adoption of the Plan, were authorized by and in compliance with Colorado's urban renewal statute. (*Id.* at 34a-37a) Therefore, he concluded, the defendants were entitled to antitrust immunity under the state action doctrine as set forth in *Parker v. Brown*, 317 U.S. 341 (1943) and its progeny. (*Id.* at 33a, 37a)

Third, he held that BCED's conduct was protected from antitrust attack by the *Noerr-Pennington* doctrine. (*Id.* at 34a, 36a) *Fourth*, he held that the defendants did not violate the plaintiffs' civil rights because the Plan was rationally related to a legitimate public purpose: the economic revitalization of downtown Denver. (*Id.* at 38a-41a)

B. The Tenth Circuit's Decision.

The petitioner and the Oberndorf Group appealed Judge Carrigan's decision to the United States Court of Appeals for the Tenth Circuit. In that appeal, they did not raise as an issue or otherwise challenge directly Judge Carrigan's determination that, under *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), they lacked the necessary factual support for their conspiracy allegations. Rather, as they do here, they attacked it indirectly by contending that Judge Carrigan had ignored their "evidence" and had limited himself to a mere "facial" review of the legislative record. (App. Pet. at 7a). *See* Pet. at 3 ("Had either court undertaken a full review of the evidentiary record. . . . ")

After conducting a *de novo* review of the record, the 10th Circuit held that the district court had "adequately considered all of the evidence." (App. Pet. at 7a) The Court of Appeals also concluded, after its review, that there were no genuine issues of material fact which would prevent the entry of summary judgment. (*Id.* at 2a)

Applying the substantive law to those undisputed facts, the Court of Appeals agreed that state action immunity shielded the formulation and adoption of the Plan under Colorado's urban renewal statute. (*Id.* at 6a-11a) The Court of Appeals also held that the *Noerr-Pennington* doctrine protected BCED from antitrust claims. The Court of Appeals did not address whether the "co-conspirator" or "illegal activity" exceptions to the *Noerr-Pennington* doctrine should be applied because it found no factual basis to support those exceptions. (*Id.* at 11a-14a) Finally, the Court of Appeals affirmed the district court's decision that, because the Plan was rationally related to the legitimate public purpose of revitalizing downtown Denver, the civil rights challenges should be dismissed. (*Id.* at 14a-18a)

REASONS WHY THE WRIT SHOULD BE DENIED

I. THERE IS NO REASON FOR THIS COURT TO REVIEW THE TENTH CIRCUIT'S STATE ACTION IMMUNITY DECISION.

The Tenth Circuit's decision does not present this Court with the necessity, or even a meaningful opportunity, to clarify, refine, or explain its application of state action immunity to municipalities under *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985) and *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978). Nor did the Tenth Circuit create or exacerbate a split among the Court of Appeals as to how those tests should be applied.

A. This Petition is an Attempt to Continue Litigation over the Conclusions to be Drawn from Undisputed Evidence.

Far from posing a serious legal issue as to the standard to be employed by courts in reviewing a municipality's actions for the purpose of granting or denying state action immunity, the petitioner is looking for a sympathetic audience for the factual conclusions which it asserts should be attached to the undisputed evidence. According to the petitioner, it lost below only because the lower courts "ignored" its evidence that the Municipal Defendants, DURA, and BCED illegally conspired to adopt an urban renewal plan. Those courts, the petitioner asserts, would have found a conspiracy if only they had reviewed the evidence:

> Had either court undertaken a full review of the evidentiary record, as required by Rule 56 of the Federal Rules of Civil Procedure and this Court's opinions, it would have become evident that . . .

(Pet. at 3-4.)

The petitioner made the same complaint to the Tenth Circuit after the district court ruled that there was insufficient evidence of the alleged conspiracy. [3] The Tenth Circuit investigated and rejected that contention. After reviewing the factual record *de novo*, the Tenth Circuit held that the district

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[3] Although they now assert that Rule 56 should have been properly applied by the lower courts (Pet. at 3-4), the petitioner does not claim now — nor did it before the Tenth Circuit — that there were genuine issues of material fact which should have prevented summary judgment. *See E.E.O.C. v. Federal Labor Relations Auth.*, 476 U.S. 19, 24 (1986) ("Our normal practice . . . is to refrain from addressing issues not raised in the Court of Appeals.").

court had conducted a thorough factual review and considered all of the evidence:

> *Arguing that the district court refused to consider evidence that the legislative record was a sham*, landowners contend that the district court applied the wrong legal standard by limiting consideration to a facial review of the legislative record made by the City Council and DURA. *We conclude that the district court adequately considered all of the evidence* and affirm the district court's holding that state action immunity protects the Municipal defendants and BCED.

(App. Pet. at 7a, 8a) (emphasis added).

The Tenth Circuit then dissected the conspiracy allegations and the evidence which supposedly supported the petitioner's conclusions, and found it insufficient. (App. Pet. at 8a-11a.) For example, it considered and rejected petitioner's claim that the Municipal Defendants and DURA "were not attempting to eliminate blight as required by the Colorado Urban Renewal Law" and that a fraudulent urban renewal area was justified by a "sham" blight study:

> *After reviewing the record*, we conclude that the lack of blight on the Centerstone blocks and the landowners' asserted reasons [explaining why] defendants created the fifteen-block area *are not sufficient to prove the blight study was a sham.*

(App. Pet. at 8a, 9a) (emphasis added). Similarly, the Court of Appeals held that there was no evidence that alleged misrepresentations or other bad conduct occurred:

> However, *these allegations are not supported by sufficient evidence* nor do the landowners show how these instances of misrepresentation relate to their claims that the urban renewal plan was not authorized by state law.

(App. Pet. at 11a) (emphasis added). Finally and conclusively, the Tenth Circuit held that its review of the record found insufficient evidence to support the alleged conspiracy:

> *Although landowners allege that the public purposes set forth for the plan are fraudulent and that the Plan favored BCED, we do not find sufficient evidence* in the record to support the landowners' claim for a violation of civil rights *or their claim of a conspiracy.*

(App. Pet. at 18a) (emphasis added).

Therefore, the petitioner here resembles countless unsuccessful litigants who can rationalize their loss at the trial court level only by claiming that the evidence was not understood or was ignored. Such complaints, however, do not satisfy the standards for granting a writ of certiorari.

B. The Tenth Circuit's Decision Does Not Create a Conflict Among the Circuits.

Neither the Tenth Circuit's review of the facts nor its application of the state action immunity doctrine creates a conflict with any other Courts of Appeal. Nonetheless, the petitioner contends that the Fourth, Fifth, and Eighth Circuits conducted "thoughtful" or "careful" reviews of the facts to determine whether *Town of Hallie*'s tests for extending state action immunity to municipalities have been satisfied.[4] (Pet. at 17-18.) The Tenth, Ninth, and Eighth Circuits, according to the petitioner, have elected to conduct "lesser level" or "relaxed level" reviews. (Pet. at 18-19.) In reality, the petitioner is simply categorizing cases according to whether the plaintiffs won or lost.

Nothing but the result distinguishes the "relaxed" or "lesser level" Circuits from those favored by the petitioner. Both the Tenth Circuit in this case, (App. Pet. at 6a-7a), and the Ninth Circuit in *Boone v. Redevelopment Agency of City of*

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[4] See *Town of Hallie v. City of Eau Claire*, 471 U.S. at 46, 105 S.Ct., at 1720.

San Jose, 841 F.2d 886, 890 (9th Cir. 1988) *cert. denied* 488 U.S. 965 (1988) applied the standards set forth by this Court in *Town of Hallie* and *Lafayette*.[5] None of these Courts of Appeals state that, in those decisions, they are applying "lesser level" or "relaxed level" reviews. Nor do they state that they must confine themselves to reviewing the "paper record" or determining whether the municipalities merely "facially complied" with state statutes, thereby avoiding delving into a record establishing the plaintiff's conspiracy allegations. (App. Pet. at 7a-11a); *Boone v. Redevelopment Agency of City of San Jose*, 841 F.2d, at 890-891; *Scott v. City of Sioux City, Iowa*, 736 F.2d, at 1212-1216. Instead, as established above, the Tenth Circuit carefully conducted its own factual review and found each piece of the alleged conspiracy unsupported by evidence.[6](App. Pet. at 7a-11a.) Thus, the

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[5] The third "relaxed level" decision identified by petitioners, *Scott v. City of Sioux City, Iowa*, 736 F.2d 1207, 1210-1212 (8th Cir. 1984), *cert. denied*, 471 U.S. 1003 (1985), was decided before this Court's decision in *Town of Hallie*, but it applies the *Lafayette* standards.

[6] Deference to state courts' enforcement and interpretation of their statutes is not proof of an impermissibly "relaxed" review. (*See* Pet. at 20.) Instead, such deference is entirely consistent with, and demanded by, the federalism underpinnings of the state action doctrine:

> Requiring such a close examination of a state legislature's intent to determine whether the federal antitrust laws apply would be undesirable also because it would embroil the federal courts in the unnecessary interpretation of state statutes. Besides burdening the courts, it would undercut the fundamental policy of *Parker* and the state action doctrine of immunizing state action from federal antitrust scrutiny.

Town of Hallie v. City of Eau Claire, 471 U.S., at 44, n.7.

Tenth, Ninth and Eighth Circuits neither condoned nor conducted the types of limited review ascribed to them by the petitioner.[7]

Besides misrepresenting the nature and level of the Tenth Circuit's review, the petitioner attempts to create a conflict among the circuits by mischaracterizing the Fourth Circuit's decision in *Omni Outdoor Advertising v. Columbia Outdoor Advertising*, 891 F.2d 1127 (4th Cir. 1989), *cert. granted sub nom. Columbia Outdoor Advertising v. Omni Outdoor Advertising*, U.S. , 110 S.Ct. 3211 (1990). Contrary to the petitioner's implicit suggestion, the Fourth Circuit did *not* hold that *Town of Hallie*'s requirements were not satisfied or that the defendants' actions were not authorized by state

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[7] Contrary to the petitioner's assertion, the Tenth Circuit did not broaden the state action immunity doctrine by overlooking this Court's requirement in *Patrick v. Burget*, 486 U.S. 94, 108 S. Ct. 1658 (1988) that private entities be actively supervised by the state in order to be immune from antitrust attack. (*See* Pet. at 18-19, n.20.) That requirement applies when a private entity enacts the anticompetitive measure. *Patrick v. Burget*, 486 U.S., at , 108 S. Ct., at 1663. When a municipality adopts the allegedly anticompetitive measure — for example, the Denver City Council's approval of the Plan in issue here — no such active state supervision is required. *Town of Hallie v. City of Eau Claire*, 471 U.S., at 46 ("We now conclude that the active state supervision requirement should not be imposed in cases in which the actor is a municipality.").

Because the urban renewal process requires close cooperation between the public and private sectors, state action immunity has been extended to the private developers who were named as co-defendants. *Cine 42nd Street Theater Corp. v. Nederlander Organization Inc.*, 790 F.2d 1032, 1048 (2d Cir. 1986) ("[T]he private appellees acting in concert with the [urban development agency] are also entitled to state immunity."); *Scott v. City of Sioux City, Iowa*, 736 F.2d, at 1215 ("Since the state has authorized both the business relationship between the city and [the developer] and the city's zoning actions, it is clear that Metro Center's dealings with the council fall within the ambit of antitrust immunity.")

statute. (Pet. at 17.) Instead, the Court held that the challenged activities were authorized by state statute and that the requirements for state immunity were met:

> We look therefore to the authorizing South Carolina statutes to determine if the City regulated billboards pursuant to a "clearly articulated and affirmatively expressed state policy" which "clearly contemplate[s]" that the City may effect anti-competitive conduct, *and conclude that Town of Hallie's requirements are satisfied.*

Omni Outdoor Advertising v. Columbia Outdoor Advertising, 891 F.2d, at 1132 (emphasis added).

Further, the Fourth Circuit did not deny immunity as the result of a "careful review" of whether the challenged municipal conduct was authorized by state statute. Instead, it recognized a "conspiracy exception" which provided that immunity could be denied *even though* the *Town of Hallie*'s tests were satisfied *if* the defendants conspired solely to advance a private entity's anticompetitive purposes:

> *Although we conclude that the authorization granted by the State of South Carolina to its municipalities to regulate the billboard industry normally would be sufficient to clothe the municipalities with Parker immunity* in exercising that authority, we agree with Omni's contention that the *Parker* exemption is unavailable here. Implicit in the jury verdict was a finding that the City was not acting pursuant to the direction or purposes of the South Carolina statutes but conspired solely to further COA's commercial purposes to the detriment of competition in the billboard industry.

Id., at 1132-33 (emphasis added).

The Fourth Circuit's adoption of that exception in no way creates a conflict with the Tenth Circuit's decision here.

Because there was no evidence to support the alleged conspiracy to adopt an urban renewal plan to benefit BCED rather than to achieve the purposes of Colorado's urban renewal statute, the Tenth Circuit did not have to reach the issue of whether to recognize or apply such an exception.[8] Thus, the difference between the Fourth Circuit's decision in *Omni Outdoor Advertising* and the Tenth Circuit's decision here is that the *Omni* plaintiff supported its conspiracy allegations and the petitioner did not.

Evidence — or the lack of evidence — of a conspiracy also explains why the Eighth Circuit was "careful" in *Westborough Mall v. City of Cape Girardeau, Mo.*, 693 F.2d 733 (8th Cir. 1982) but "relaxed" in *Scott*. Although it considered its prior decision in *Westborough Mall* as well as the Fifth Circuit's "careful" review in *Whitworth v. Perkins*, 559 P.2d 378 (5th Cir. 1977), *vacated on other grounds*, 435 U.S. 992 (1978) *cert. denied* 440 U.S. 911 (1979), (*see* Pet. at 18), the Eighth Circuit in *Scott* reached a different outcome because it reviewed different evidence:

> A city council could conceivably violate the antitrust laws by entering into an agreement with a private developer to restrain trade. *See Westborough Mall v. City of Cape Girardeau, supra*, 693 F.2d at 746; . . . *Whitworth v. Perkins*, 559 F.2d 378, 381 (5th Cir. 1977), *vacated on other grounds*, 435 U.S. 992, 98 S. Ct. 1642, 56 L. Ed. 2d 81 (1978); Areeda, Antitrust Law, *supra*, ¶ 203.3 at 12-13. *In this case, however, the appellants have alleged no actions which appear outside the ambit of the city's antitrust immunity.*
>
> * * *

---

[8] Nor did the petitioner contend in the lower courts that such an exception to the state action immunity doctrine should be applied. The petitioner sought the adoption and application of a co-conspirator exception to the *Noerr-Pennington* doctrine.

> In sum, *we do not believe a material issue of fact exists as to whether the city acted outside the state's authorization for antitrust purposes either* in its dealings with Metro Center prior to passing the challenged ordinances or in the procedures followed to enact them.

Scott v. City of Sioux City, Iowa, 736 F.2d, at 1214-1216 (emphasis added).[9]

Therefore, the Tenth Circuit's decision does not create a split among the circuits as to the proper method or level of applying this Court's decision in *Town of Hallie*, and the writ should be denied.

II. THE TENTH CIRCUIT'S NOERR-PENNINGTON DECISION DOES NOT CONSTITUTE AN OPPORTUNITY FOR THIS COURT TO CONSIDER THE CO-CONSPIRATOR EXCEPTION.

The Tenth Circuit did not decide whether or not to adopt a co-conspirator exception to the Noerr-Pennington doctrine. It did not need to reach that issue because it held that the petitioner had not come forward with sufficient facts to apply that exception to the instant case:

> We agree with the district court's conclusion that *the landowners have not submitted any evidence indicating that any "deal" was made, bribe taken, or illegal conspiracy formed* between the Municipal defendants and BCED.
>
> The landowners' allegations of secret meetings and covert agreements between the City and BCED

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[9] Contrary to the petitioner's assertions, the Fifth Circuit's decision in *Whitworth v. Perkins*, 559 F.2d 378 (5th Cir. 1977) does not shed any light on the proper standard for reviewing municipal actions because it was decided before this Court's decisions in *Town of Hallie* and *Lafayette*.

> *are not supported by sufficient evidence* of a conspiracy such that a possible co-conspirator exception [should] be considered. *Therefore, we need not address whether to adopt a "co-conspirator" exception to Noerr-Pennington.*

(App. Pet. at 13a) (emphasis added).

Therefore, this case would not offer the Court an opportunity to decide whether to adopt a co-conspirator exception to the *Noerr-Pennington* doctrine.

III. NO SUPREME COURT ISSUE WAS CREATED BY THE TENTH CIRCUIT'S DECISION ON PETITIONER'S CIVIL RIGHTS CLAIMS.

Nothing about the Tenth Circuit's decision on the petitioner's civil rights claims requires this Court's attention. The Tenth Circuit affirmed the district court's determination that the Plan was adopted by Denver's City Council to achieve the legitimate public purposes of eliminating blight and revitalizing downtown Denver. (App. Pet. at 16a-17a) Upholding the district court was merely a routine application of this Court's long-standing rule that civil rights challenges to legislation are satisfied if the legislation is rationally related to such a legitimate public purpose:

> [W]hen the legislature has spoken, the public interest has been declared in terms well-nigh conclusive . . . . But the means of executing the project are for [the legislature and the legislature] alone to determine, once the public purpose has been established.

Berman v. Parker, 348 U.S. 26, 32-33 (1954) (App. Pet. at 16a-17a).

The petitioner's attempt to transform this decision into an issue for this Court must fail. Its contention that this Court should adopt a different standard for reviewing the constitutionality of municipal legislative actions, as opposed to state

legislative actions, is a theory and a prayer. The petitioner "supports" its notion by citing only this Court's decision in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), an antitrust case discussing the applicability of state action immunity to municipalities. (*See* Pet. at 24.) As the Tenth Circuit correctly decided, whether the municipal actions were authorized by Colorado's urban renewal law is irrelevant to the petitioner's civil rights claim. (App. Pet. at 15a) *See Snowden v. Hughes*, 321 U.S. 1, 11 (1944) (An action's "illegality under the state statute can neither add to nor subtract from its constitutional validity.") Moreover, the petitioner does not cite to any decisions applying its theory that antitrust standards should be used to measure civil rights challenges.

Therefore, there is no reason for this Court to consider the Tenth Circuit's decision on the petitioner's civil rights claims.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

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No. 90-6

In The

Supreme Court of the United States

October Term, 1990

BLOCK 173 ASSOCIATES,

Petitioner,

v.

THE CITY AND COUNTY OF DENVER, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

DISCUSSION 3

I. ACCORDING FEDERAL ANTITRUST IMMUNITY TO THESE DEFENDANTS DOES VIOLENCE TO THIS COURT'S PRIOR DECISIONS ON ANTITRUST IMMUNITY 3

A. The activities of the municipal defendants were unauthorized by state statute and thus are not deserving of municipal immunity 3

B. The activities of BCED are not deserving of *Noerr-Pennington* immunity 7

II. THE TENTH CIRCUIT'S RESOLUTION OF THE CIVIL RIGHTS CLAIM IS INCOMPATIBLE WITH THIS COURT'S PRIOR DECISIONS 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Affiliated Capital Corp.v. Houston, 735 F.2d 1555 (5th Cir. 1984), *cert. denied sub nom. Gulf Coast Cable Television Co. v. Affiliated Capital Corp.*, 474 U.S. 1053 (1986) 8

Berman v. Parker, 348 U.S. 26 (1954) 9, 10

Boone v. Redevelopment Agency, 841 F.2d 886 (9th Cir. 1988) 6

Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982) 7

Graham v. Burgess, 117 U.S. 180 (1886) 5

Metro Cable Co. v. CATV of Rockford, Inc., 516 F.2d 220 (7th Cir. 1975) 8

Scott v. City of Sioux City, Iowa, 736 F.2d 1207 (8th Cir. 1984) 6

Snowden v. Hughes, 321 U.S. 1 (1944) 10

Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985) 3, 7

Westborough Mall, Inc. v. City of Cape Girardeau, 693 F.2d 733 (8th Cir. 1982), *cert. denied sub nom. Drury v. Westborough Mall, Inc.*, 461 U.S. 945 (1983) 7

STATUTES

STATE

Colo. Rev. Stat. § 31-25-102 (1986) 4

Colo. Rev. Stat. § 31-25-103(2) (1986) 6

TABLE OF AUTHORITIES – Continued

Page

Colo. Rev. Stat. § 31-25-106(2) (1986) 6

Colo. Rev. Stat. § 31-25-107 (1986) 4, 6

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In The

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

INTRODUCTION

In the Respondents' Joint Brief In Opposition ("Joint Brief"), respondents acknowledge that they, as the municipal and private defendants below:[1] (a) determined to

[1] The municipal defendants, or respondents, include the City and County of Denver, the Mayor of Denver, the City Council of the City and County of Denver and its council members and the Denver Urban Renewal Authority. The private defendant or respondent is BCE Development Properties, Inc. ("BCED").

construct the Centerstone project[2] on the unblighted property of Block 173 Associates ("Block 173"); (b) advanced the project by devising an anticompetitive course of action with Block 173's property rights as a target; (c) understood that their intended conduct fell outside the scope of any state delegation of authority; and (d) attempted to conceal the lack of authority with a facade of compliance with the Colorado Urban Renewal Law ("CURL"), a state provision triggered only by the need to eliminate or prevent blight.

Thus, the case squarely presents the questions for review set out in the Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit ("Petition"). In sum, the concern is whether municipalities and private conspirators can shield themselves from federal antitrust and civil rights liability by means of technical compliance with an inapplicable state law.

In response to the Petition, the defendants do not dispute the chronology of the Centerstone project, offer legal argument justifying their actions, or attempt to deny the importance of the matters raised. Instead, they seek to evade review through: (a) emphasizing their success in distracting lower tribunals from the primary issue of illegality, *see* Joint Brief at 7-10, 17; (b) characterizing their motives as blameless, *id.* at 2, 5-6; and (c) comparing their unauthorized actions to those of defendants acting in accordance with state law and policy, *id.* at 12-14, 16. In

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[2] As explained in the Petition and the Joint Brief, the Centerstone project was a multi-block, retail-commercial project to be built in downtown Denver. Block 173 Associates owned one of the blocks on which Centerstone was to be built.

essence, the defendants rely on their previous success in elevating illusion and form over reality and substance.

DISCUSSION

I. ACCORDING FEDERAL ANTITRUST IMMUNITY TO THESE DEFENDANTS DOES VIOLENCE TO THIS COURT'S PRIOR DECISIONS ON ANTITRUST IMMUNITY.

A. The activities of the municipal defendants were unauthorized by state statute and thus are not deserving of municipal immunity.

This Court has made it clear that a municipality is immune from antitrust liability only if it is acting under a state statutory delegation of authority. *E.g., Town of Hallie v. City of Eau Claire,* 471 U.S. 34 (1985).[3] The potential immunity for municipal conduct is narrow, and designed to allow sovereign states latitude to effectuate a policy through a delegation of power to local governmental entities. *Id.*

The issue of municipal immunity entered this case solely because the defendants knew that the power of condemnation and the power to issue tax increment financing bonds were essential to BCED's successful development of Centerstone on petitioner's land. These

[3] The second requirement of municipal antitrust immunity is that the state statute evidence an affirmatively expressed and clearly articulated policy to displace competition. It is agreed that CURL does manifest a policy to displace competition. Petition at 8a. Hence, the satisfaction of the second prong of the *Town of Hallie* test is not in dispute in this case.

powers could be available to them only through CURL. Joint Brief at 3; Petition at 25a-26a.

However, the defendants' need for the powers authorized in CURL did not make the statute applicable to their intended development of Centerstone. CURL is not an all-encompassing delegation of authority available to municipalities whenever officials determine that its employment is in the public interest. The delegation is limited to those situations in which CURL powers are necessary to combat and eliminate blight. *See* Colo. Rev. Stat. § 31-25-102, Petition at 73a-74a; Colo. Rev. Stat. § 31-25-107(1), Petition at 86a.

Thus, the defendants had to deal with two realities: (a) a finding of blight was a jurisdictional prerequisite for CURL; and (b) no blight existed on the Centerstone blocks. They therefore developed a scheme whereby the urban renewal study area was broadened to encompass the geographic area surrounding the Centerstone blocks. After the expansion reached a fifteen-block area, the obligatory blight was found. Armed with this artificial blight finding, the defendants invoked CURL provisions. They then carefully followed the technical requirements of the CURL process as they moved toward construction of Centerstone on the three unblighted blocks.

The defendants' theory is that they, along with other municipalities, can gain immunity from the provisions of federal antitrust law by clothing their actions with the appearance of state authorization. Their notion is contrary to the prior cases of this Court and the policies of antitrust law. A much-earlier attempt to conceal reality

through strict compliance with legalities met with the following reaction in this Court:

> It is insisted that the proceedings were all conducted according to the forms of law. Very likely. Some of the most atrocious frauds are committed in that way. Indeed, the greater the fraud intended, the more particular the parties to it are to proceed according to the strictest form of the law.

Graham v. Burgess, 117 U.S. 180, 186 (1886).

The lower federal courts' approach in the instant case stands in contrast to this Court's consistent refusal to accept form over substance. The United States District Court for the District of Colorado refused to look behind the record of compliance with CURL to find that CURL, in fact, was inapplicable. *See* Petition at 35a-36a.[4] The Tenth Circuit followed suit. *See* Petition at 9a-10a.[5] In

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[4] The district court stated:

> The undisputed evidence indicates that the defendants facially complied with all statutory requirements.
>
> . . .
>
> [T]he fact that the defendant BCED may have been identified as the "first choice" developer of the Centerstone Project before the financing method was selected, and before the blight study was conducted, does not violate any statutory provision with respect to implementation of an urban renewal plan under Colorado law.

Petition at 35a-36a.

[5] The Tenth Circuit stated:

> We agree with the district court that the blight study comported with the statutory definition of "blighted

(Continued on following page)

effect, these courts equated the requisite state authorization with technical compliance with statutory procedures.

The approach taken below restricts the federal judiciary to a formalistic review of the record generated by a municipality. Courts confined to such a narrow task cannot be in a position to determine whether a municipality took an anti-competitive action in a good-faith attempt to effectuate a state delegation of authority, or whether the municipality's record concealed illegal and unimmunized anticompetitive conduct.[6]

(Continued from previous page)

area" as set forth in Colo. Rev. Stat. § 31-25-103(2) (1986).

. . .

Following the adoption of the urban renewal plan according to the procedures of Colo. Rev. Stat. § 31-25-107, DURA sent out a prospectus and conducted a competitive bidding process as described in Colo. Rev. Stat. § 1-25-106(2) (1986).

Petition at 9a-10a.

[6] In claiming that the circuit courts of appeal are in accord on this issue and that the case law supports their interpretation of the immunity doctrine, the defendants rely on citations to inapposite cases. *See* Joint Brief at 13, 16-17. The cases cited deal with situations in which: (a) the municipality was concededly acting in good faith under a state urban renewal law for the purpose of eradicating a slum or blighted area; but (b) in exercising its delegated authority, the city allegedly abused its discretion or imperfectly carried out the statutory mandates. *See Boone v. Redevelopment Agency*, 841 F.2d 886, 891 (9th Cir. 1988) ("[I]t does not follow that the city and agency would be stripped of antitrust immunity merely because they imperfectly exercised their power under state law."); *Scott v. City of*

(Continued on following page)

The doctrine of municipal immunity was created, defined and applied by this Court as a matter of federal law. It makes little sense to allow the immunity to hinge on the ability of a municipality to create a formalistic record of compliance with a state statute.[7] A meaningful review of the municipality's action must include an inquiry into the scope of the state authorization.[8]

B. The activities of BCED are not deserving of *Noerr-Pennington* immunity.

An undisputed aspect of this case is that the entire scheme to utilize CURL in the development of

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Sioux City, Iowa, 736 F.2d 1207, 1215-16 (8th Cir. 1984) ("State authorization for antitrust purposes does not require administrative decisions that are free from ordinary errors.").

The facts of these cases are not comparable to the facts of the instant case. Here, the record shows deliberate abuse and exploitation of CURL authority, not a good-faith, but perhaps mistaken, exercise of authority.

[7] This standard makes even less sense when it is compared with the strict standard of review given to the issue of whether the state has authorized anticompetitive conduct. *See, e.g., Town of Hallie*, 471 U.S. at 39-46; *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 49-57 (1982).

[8] Contrary to defendants' assertions, *see* Joint Brief at 13-16, the circuit courts of appeal have applied two different levels of review in examining the existence of state authority. *Compare Westborough Mall, Inc. v. City of Cape Girardeau*, 693 F.2d 733 (8th Cir. 1982), *cert. denied sub nom. Drury v. Westborough Mall, Inc.*, 461 U.S. 945 (1983). The Tenth Circuit opinion in this case is an extreme form of the relaxed level of review.

Centerstone was jointly devised and executed by the municipal defendants and BCED. From the inception of the plan, BCED was deeply entangled in the Centerstone operation. *See* Joint Brief at 3. BCED actually named and designed the project. Once it succeeded in enlisting municipal aid, it was given the primary responsibility for setting the boundaries of the sham urban renewal area.[9] The final drafts of the urban renewal plan and the city council's ordinance approving the plan were authored by BCED's attorney.[10] After the municipality formally adopted the ordinance, "exclusive negotiations" were conducted with BCED. Joint Brief at 6. Not surprisingly, BCED was eventually selected as the developer of the Centerstone project. *Id.* at 7.

Hence, BCED's involvement in Centerstone went far beyond activities fairly characterized as legitimate First Amendment efforts to influence governmental policy. The case thus affords this Court with an opportunity to address the often-discussed "co-conspirator exception" to *Noerr-Pennington* immunity from antitrust liability.[11]

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[9] Record, Deposition of Lamont at 188; Deposition of McFadyen at 214-18.

[10] Record, Deposition of Cheroutes at 51-52; Deposition of McFadyen at 402-403.

[11] *See, e.g., Affiliated Capital Corp. v. Houston*, 735 F.2d 1555, 1567 (5th Cir. 1984), *cert. denied sub nom. Gulf Coast Cable Television Co. v. Affiliated Capital Corp.*, 474 U.S. 1053 (1986); *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220, 230 (7th Cir. 1975).

II. THE TENTH CIRCUIT'S RESOLUTION OF THE CIVIL RIGHTS CLAIM IS INCOMPATIBLE WITH THIS COURT'S PRIOR DECISIONS.

The defendants chose to open their civil rights discussion, Joint Brief at 18, with a quotation from *Berman v. Parker*, 348 U.S. 26, 32-33 (1954). This particular quotation illustrates the fallacy of both the defendants' position and the reasoning of the lower courts. In *Berman*, this Court considered a civil rights challenge to urban renewal legislation. In affirming the legislative right to enact such a statutory scheme, the Court stated: "[W]hen the *legislature* has spoken, the public interest has been declared in terms well-nigh conclusive." *Berman*, 348 U.S. at 32 (emphasis added).

Here, it is manifest that the Colorado legislature has not spoken. The only declaration of a public purpose is the determination of BCED and the municipal defendants that the deprivation of Block 173's property rights would provide economic stimulation of downtown Denver's retail trade. For the purposes of civil rights liability, this self-serving determination cannot be the equivalent of a declaration by the Colorado legislature.[12] Where a municipality, along with private entities, purports to act under the color of state law, the issue is not whether the action was taken for *any* public purpose. The inquiry must focus on whether the action promoted a purpose

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[12] In fact, it is manifest that the taking of the petitioner's property for the Centerstone project was not contemplated by CURL. *See supra* § I(A).

authorized by the state itself.[13] Otherwise, actions of a municipality would be accorded the deference appropriate only for a sovereign state.

Admittedly, there is a lack of federal case law describing the proper yardstick with which to measure the civil rights liability of municipal and private defendants under these circumstances. *See* Joint Brief at 19. This absence of unambiguous authority in itself justifies a grant of certiorari on the issue.

CONCLUSION

The Respondents' Joint Brief in Opposition provides further support for the granting of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit requested by Petitioner Block 173 Associates. Petitioner therefore respectfully requests a writ of certiorari to be granted in this case.

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[13] The defendants' citation to *Snowden v. Hughes*, 321 U.S. 1, 11 (1944), Joint Brief at 19, is nonsensical in this context. *Berman v. Parker*, 348 U.S. at 32, stands for the proposition that the constitutionality of an action taken under the color of an urban renewal law is determined by its conformity with the legislative purpose. Consequently, legality under the state law is not only relevant, it is dispositive.